

United States
Circuit Court of Appeals

For the Ninth Circuit.

GOLDEN WEST BREWING COMPANY, a corporation,

Appellant,

vs.

MILONAS & SONS, INC., a corporation, operating under the fictitious styles of "Willows Brewing Co." and "General Enterprise Co.",
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

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PAUL P. O'BRIEN,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic: and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Northern District of California, Southern Di-
vision.

In Equity No. 3969-R

GOLDEN WEST BREWING COMPANY,

(a corporation),

Plaintiff,

vs.

MILONAS & SONS, INC., a corporation, operat-
ing under the fictitious styles of "Willows
Brewing Co." and "General Enterprise Co.",

Defendant.

BILL OF COMPLAINT.

Comes now Golden West Brewing Company,
plaintiff above [1*] named, and for a cause of

*Page numbering appearing at the foot of page of original certified
Transcript or Record.

action against the defendant complains and alleges as follows:

I.

That plaintiff is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of California, with a regular and established place of business in the City of Oakland, County of Alameda, State of California.

II.

That defendant Milonas & Sons, Inc., is a California corporation, chartered on or about September 13, 1934, with a regular and established place of business in the City and County of San Francisco, State of California, wherein the infringements herein complained of have originated.

III.

That the jurisdiction of this court depends upon the Trademark Laws of the United States.

IV.

That plaintiff is engaged in the business of brewing and marketing Malt Beverages and has so continuously been engaged since its incorporation on May 25, 1910, and through various predecessors in interest for more than forty (40) years last past; that the products of plaintiff have been marketed, generally and extensively, throughout all the western States of the United States, as well as Alaska,

Hawaii and the Philippine Islands; and that since the repeal of the Prohibition Amendment in 1933, plaintiff has done a business in excess of six million dollars (\$6,000,000) and has expended, in advertising contracts, a quarter of a million dollars, all this advertising being devoted particularly in acquainting the public with the various [2] brands and trademarks, as hereinafter specified.

V.

That plaintiff was incorporated on the 25th day of May, 1910, under and by virtue of the laws of the State of California as the successor to the following breweries:

Washington Brewery,
Anchor Brewery,
Raspiller Brewing Company,
Palmtag & Meyer Brewing Company, and
Palace Brewery;

and that about 1915, there was also merged with the plaintiff the Richmond Brewery which had carried on a similar business for a period of about forty (40) years.

VI.

That the goods and materials which go into, and form a part of, plaintiff's product, have been carefully selected, and its beverages skillfully prepared and brewed, so that plaintiff's beverages are of superior excellence; that great energy and very large expenditures of money have been devoted in the

scientific preparation of plaintiff's products and in introducing plaintiff's goods to the market and acquainting the public with the merits thereof, with the result that for many years last past the reputation and consequent demand for plaintiff's products have been and are now well established throughout the territory above mentioned; and that plaintiff's brands and trademarks, under which its goods are marketed, have an established and favorable meaning with the trade, indicating to the consuming public that the plaintiff's products have been carefully selected and prepared and could, accordingly, be purchased with confidence. [3]

VII.

That plaintiff is the owner of certain trademarks, duly registered in the United States Patent Office, in which the word "Glow" forms an essential part; said trademarks being more specifically identified as follows:

United States trademark certificate No. 231,-842, registered Aug. 30, 1927, "It's the After Glow", for malt beverages, extracts and liquors with not more than the Legal Alcoholic Content;

United States trademark certificate No. 231,-843, registered Aug. 30, 1927, "Golden Glow", for malt beverages, extracts, and liquors with not more than the Legal Alcoholic Content;

United States trademark certificate No. 232,-983, registered Sept. 20, 1927, "Golden Glow",

for malt beverages, extracts, and liquors, with not more than the Legal Alcoholic Content;

United States trademark certificate No. 307,-484, registered Oct. 24, 1933, "It's the After Glow", for malt beverages with not more than the Legal Alcoholic Content;

United States trademark certificate No. 307,-486, registered Oct. 24, 1933, "Glow", for malt beverages with not more than the Legal Alcoholic Content;

United States trademark certificate No. 322,-361, registered March 5, 1935, "Golden Glow", for malt beverages with not more than the Legal Alcoholic Content;

that these trademarks and brands are generally recognized by the trade under the single designation of "Glow" brands or trademarks, and plaintiff's beer being asked for as "Glow" beer; and that each and all of said trademarks of plaintiff have been continuously used in the business of plaintiff since about the 15th day of June, 1925.

Specimens of said trademarks of plaintiff as actually applied to its goods in Interstate Commerce are annexed hereto as a part hereof and marked "Plaintiff's Exhibit 1"; except the trademark using the word "Glow" alone, as that is applied to the metal bottle-caps, but profert of such specimen caps is hereby made.

Also said designation "Glow", as used by plaintiff, is prominently displayed on its factory and

office building in Oakland, as shown by the photograph annexed hereto as a part hereof and marked "Plaintiff's Exhibit 2". [4]

VIII.

That plaintiff is the owner of all the right, title and interest in and to the aforesaid "Glow" trademarks and registrations, and each of them, and the good-will of the business in which each of them is used, and said trademarks have been and continue to be in a large measure the means whereby the good-will of plaintiff's business is maintained and secured.

IX.

That by reason of the excellence of the quality of said products of plaintiff, and of its predecessors in interest, extending over a long period of time, there has been created a very valuable good-will in connection therewith, particularly in the various trademarks aforesaid of plaintiff and under which its products are marketed.

X.

That the trade name or names "Glow", "Golden Glow" and "It's the After Glow", as applied to malt beverages having not over the Legal Alcoholic Content, are sold in grocery and other stores, and have, by reason of the acts of plaintiff aforesaid, come to mean, and for many years last past have meant, in the grocery trade and among the public,

who have occasion to buy such goods, that such products bearing said trademarks, or any mark in which the word "Glow" is predominant, are the products of plaintiff and of no one else, particularly since the designation "Glow" has become so peculiarly identified with the plaintiff's goods.

XI.

That as plaintiff is informed and believes and so states the fact to be, defendant did only recently, and long after [5] plaintiff had, through a long course of honorable dealing, built up an enviable reputation and good-will for its various "Glow" trademarks, adopt, in imitation of plaintiff's trademarks, the name "Alpen Glow" as applied to malt beverages and goods of identically the same descriptive properties as those of plaintiff on which its various "Glow" trademarks have been applied.

XII.

Further, it is shown that defendant's goods bearing the name "Alpen Glow" prominently thereon are sold through identically the same channels and same retail outlets and in the same market in competition with plaintiff's genuine "Glow" goods; and that defendant also has numerous delivery wagons and trucks upon the streets of San Francisco and in the Bay Region bearing the words "Alpen Glow" prominently on the sides of its wagons and trucks.

A specimen of defendant's imitation "Glow" label is annexed hereto as a part hereof and marked "Plaintiff's Exhibit 3".

A photograph of one of defendant's trucks prominently displaying the "Glow" sign is annexed hereto as a part hereof and marked "Plaintiff's Exhibit 4", and a photograph of defendant's place of business prominently displaying the name "Alpen Glow" is annexed hereto as a part hereof and marked [6] "Plaintiff's Exhibit 5".

That in addition to the use of the word "Glow" by defendant, defendant has featured the golden color upon its trucks and wagons.

XIII.

Further, that defendant's product is a much inferior product to that of plaintiff and sells at a cheaper and cut-rate price.

XIV.

That plaintiff further shows that a large percentage of the beer-consuming public is made up of illiterate foreigners and others who, having become familiar with plaintiff's "Glow" beer, are confused by the similarity of appearance of the brands of plaintiff and of defendant, and that many will ask for beer by the name "Glow" only; that defendant in adopting the name "Alpen Glow" did so with the unfair and fraudulent intent, scheme and plan of passing off its inferior "Alpen Glow" goods as the genuine "Glow" goods of plaintiff, and with the intent and purpose of deceiving the public, under the belief by the public that defendant exerted the [7] same care, used the same carefully

selected ingredients, the same skillful preparation and consulted with Eastern laboratories, as the plaintiff has done and does; and that defendant's conduct constitutes unfair competition.

XV.

That plaintiff further shows that its attention was first brought to the wrongful conduct of defendant in adopting this name "Alpen Glow" by the publication in the Official Gazette of the United States Patent Office for October 2, 1934, that Milanos & Sons, doing business as General Enterprise Co., of San Francisco, were seeking to register the words "Alpen Glow" for "Malt, Cereal Beverage having not over the Legal Alcoholic Content", claiming use since April 7, 1933; that thereupon plaintiff filed an Opposition in the Patent Office, to said registration, as in such cases made and provided, to which defendant answered, merely alleging that "Alpen Glow" was not so similar to "Golden Glow" as to cause confusion in the trade; that times were set for taking testimony, but before it became necessary for plaintiff to move in the matter, plaintiff was advised, inasmuch as a Trademark Opposition merely affected the applicant's right to register the trademark and did not compel a losing party to desist in its use, to discontinue, without prejudice, its opposition and to institute an injunction suit instead; that accordingly, on or about April 20, 1935, the Patent Office Examiner of Interferences entered an order reading as follows:

“The motion to dismiss filed by the opposer on April 13, 1935, is noted by the Examiner.

“In view thereof the notice of opposition is hereby dismissed without [8] prejudice.” The proceeding is deemed to be terminated and the files are herewith returned to the examiner of trade-marks.”

XVI.

That on investigating further as to the standing and responsibility of the defendant at that time, that is, in April, 1935, the plaintiff was informed and believes and so states the fact to be that defendant was about to go out of the beer business and if it did a lawsuit would be of no use whatsoever; that nevertheless, recently, and within the last six weeks, plaintiff's attention was called to the fact that defendant has just put several wagons, painted blue and gold and bearing the words “Alpen Glow” on the sides, upon the streets of San Francisco, and that said defendant was about to embark upon a new selling campaign and that it had arranged to sell its goods at a price below the recognized standard for goods of the quality of plaintiff.

XVII.

That notwithstanding the fact that defendant was fully advised of plaintiff's trademarks in the premises, it has proceeded to defy plaintiff's rights and has continued or resumed, and threatens to continue, the wrongful simulation and imitation of plaintiff's trademarks, as aforesaid.

XVIII.

That as a result of defendant's wrongful simulation and imitation of plaintiff's "Glow" trademarks and its threat to continue its unlawful practices, plaintiff has suffered great damage and irreparable injury; that the value of the good-will of plaintiff's business in respect to said "Glow" trademarks is in excess of a quarter of a million dollars; and that the unlawful acts of defendant herein complained of has interfered with [9] plaintiff's business and diverted profits which, of right, belong to plaintiff, and if the acts of defendant are not enjoined defendant will continue to divert business, rightfully belonging to plaintiff, to defendant.

XIX.

That while plaintiff is not definitely informed as to the extent of the use of the name "Alpen Glow" by defendant or the quantity of goods sold thereunder, plaintiff alleges, on information and belief, that the amount to which plaintiff is entitled to recover by this suit is in excess of Ten Thousand Dollars (10,000.).

Wherefore plaintiff prays:

1. That a subpoena may be issued out of and under the seal of this Honorable Court, directed to the said defendant, commanding it to appear before this Honorable Court on a certain day and under a certain penalty to be therein expressed, to appear and abide by such order and decree herein as to

your Honor may seem meet and as the equity of the case may require.

2. That an injunction issue herein, perpetually restraining and enjoining the defendant, its officers, managers, agents, servants, attorneys, clerks and employees and all in privity with it from making or selling, or offering for sale, or dealing in any and all goods which, by advertisement or otherwise, use the words "Alpen Glow" or the word "Glow"; and from directly or indirectly engaging in the manufacture, sale or offering for sale of malt beverages, or bearing any colorable imitation of any of plaintiff's trademarks and names aforesaid. [10]

3. That a temporary injunction or order may be issued during the pendency of this suit directed to the said defendant enjoining it, as prayed in the next preceding paragraph.

4. That the defendant be compelled to render a full, true and correct account of all profits of every description which defendant has made by reason of the marketing and sale of malt beverages under the name "Alpen Glow"; that defendant be adjudged and decreed to pay over all the said profits to plaintiff; that the loss and damage which plaintiff has suffered by such unlawful acts of defendant also be ascertained and assessed against defendant; and that the defendant be adjudged and decreed to pay the same to plaintiff.

5. That treble damages may be decreed in view of the willful character of defendant's unlawful

acts; and that plaintiff have judgment against defendant for said damages so found and adjudged.

6. That plaintiff have judgment against defendant for its costs and disbursements herein and for such other, further or different relief as may be agreeable to equity.

GOLDEN WEST BREWING
COMPANY,

[Corporate

Seal]

By GEORGE F. GOERL,

Vice-President.

CHAS. E. TOWNSEND,

ROY C. HACKLEY, JR.,

Solicitors and Counsel for Plaintiff. [11]

United States of America,

Northern District of California,

County of Alameda—ss.

George F. Goerl, being duly sworn, deposes and says that he is Vice-President of Golden West Brewing Company, plaintiff in the within entitled action; that he has read the foregoing Bill of Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes them to be true.

GEORGE F. GOERL.

Subscribed and sworn to before me this 17th day of December, 1935.

[Notarial Seal] B. CIPRESSO,
Notary Public in and for the County of Alameda,
State of California.

My Commission expires November 7, 1938. [12]

PLAINTIFF'S EXHIBIT 1:

4 of plaintiff's labels and bottle neck bands
"Golden Glow".

PLAINTIFF'S EXHIBIT 2:

Photograph of Plaintiff's factory and office building.

PLAINTIFF'S EXHIBIT 3:

Defendant's label and bottle neck band "Alpen Glow".

PLAINTIFF'S EXHIBIT 4:

Photograph of Defendant's truck bearing name
"Alpen Glow".

PLAINTIFF'S EXHIBIT 5:

Photograph of Defendant's plant and office showing window signs.

[Endorsed]: Filed Dec. 17, 1935. [13]

[Title of District Court and Cause.]

ORDER.

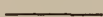
Defendant's motion to dismiss the bill of complaint on file herein having been heretofore submitted, it is, after a full consideration

Ordered that said motion to dismiss be and the same is hereby denied.

Dated: May 19, 1936.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed May 19, 1936. [14]



[Title of District Court and Cause.]

ANSWER OF DEFENDANT TO BILL OF
COMPLAINT.

Comes now Milonas & Sons, Inc., a corporation, the Defendant above-named, and for answer to the Bill of Complaint filed herein admits, denies and alleges as follows: [15]

I.

Answering paragraph I of said Complaint, Defendant is without knowledge as to whether Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of California, or of any other state; but Defendant admits that Plaintiff has a regular and established place of business in the City of Oakland, County of Alameda, State of California.

II.

Answering paragraph II of said Complaint, Defendant admits that it, Milonas & Sons, Inc., is a California corporation, chartered on or about September 13, 1934, with a regular and established place of business in the City and County of San Francisco, State of California; but Defendant denies any infringement of any rights of Plaintiff, within said City, County and State, or at any other place or places.

III.

Answering paragraph III of said Complaint, Defendant denies that the jurisdiction of this Court depends upon the Trademark laws of the United States, and alleges that the Certificates of Registration of Plaintiff's alleged trademarks in the United States Patent Office are, and each of them is, invalid; and that this Court is without jurisdiction of other alleged causes of action in said Complaint.

IV.

Answering paragraph IV of said Complaint, Defendant is without knowledge as to the facts alleged in said paragraph IV and thereupon denies the same, except that Defendant admits that Plaintiff is engaged in marketing beer and ale beverages.

V.

Answering paragraph V of said Complaint, Defendant is without knowledge of the facts alleged in said paragraph V and thereupon denies each and every of said allegations. [16]

VI.

Answering paragraph VI of said Complaint, Defendant denies that the goods and materials which go into and/or form a part of Plaintiff's product, or any of them, have been carefully selected and/or that its beverages are skillfully prepared and/or brewed and/or that Plaintiff's beverages are of superior excellence; Defendant is without knowledge as to the fact of any of the other allegations in said paragraph VI contained and thereupon denies each and every of said other allegations in said paragraph VI.

VII.

Answering paragraph VII of said Complaint, Defendant admits that the specifically identified Certificates of Registration in the United States Patent Office No. 231,842, No. 231,843, No. 232,983, No. 307,484, No. 307,486, and No. 322,361 were issued by the United States Patent Office, on the respective dates, and for the respective marks and goods specifically set forth in said paragraph VII; but Defendant is without knowledge as to whether Plaintiff is the owner of said Trademarks or the specifically identified Registrations thereof, and thereupon denies said allegation; Defendant denies that the word "Glow" forms an essential part of any of said trademarks so registered; Defendant denies that said alleged trademarks and/or brands, or any of them, are generally, or at all, recognized by the trade under the single designation of "Glow" brands and/or trademarks, and denies that Plain-

tiff's beer is asked for as "Glow" beer; and Defendant denies that each and all or any of said alleged trademarks of Plaintiff have been continuously, or at all, used in the business of Plaintiff since about the 15th day of June, 1925; and Defendant alleges that each and all of said alleged trademarks and the alleged registrations thereof in the United States Patent Office as specifically [17] identified in said paragraph VII, are and each of them is, invalid; Defendant is without knowledge as to each and all and every of the other facts in said paragraph VII alleged, and thereupon denies such other allegations and each of them.

VIII.

Answering paragraph VIII of said Complaint, Defendant denies that Plaintiff is the owner of all or any of the right, title and interest in and/or to the "Glow" trademarks and/or registrations alleged in said Complaint, and each or any of them, and/or the good will of the business, if any, in which each or any of said alleged trademarks are used; and Defendant denies that said alleged trademarks have been and/or continue to be in a large, or any measure, the means whereby the good will of the Plaintiff's business is maintained and secured.

IX.

Answering paragraph IX of said Complaint, Defendant is without knowledge as to the fact or facts

alleged in said paragraph IX and thereupon denies each and every of said allegations.

X.

Answering paragraph X of said Complaint, Defendant denies that the tradename or names "Glow", "Golden Glow", and "It's the After Glow", applied to malt beverages having not over the legal alcoholic content, are sold in grocery and other stores, and denies that said marks have, by reason of the alleged acts of Plaintiff, or at all, come to mean, and/or for many years last past have meant, in the grocery trade and/or among the public who have occasion to buy such goods, that such products bearing said alleged trademarks and/or any mark in which the word "Glow" is predominant, are the products of Plaintiff and of no one else, and denies that the allegations of said paragraph X are particularly so by reason of any designation [18] of said goods by the word "Glow" and denies that said word "Glow" has become peculiarly identified with Plaintiff's goods.

XI.

Answering paragraph XI of said Complaint, Defendant denies that it did, only recently and long after Plaintiff had through a long course of honorable and/or other dealings, or at all, built up an enviable reputation and good will for its various alleged "Glow" trademarks, adopt in imitation of Plaintiff's trademarks, the name "Alpen Glow"

as applied to malt beverages and goods of identically the same descriptive properties as those of Plaintiff on which Plaintiff alleges its various "Glow" trademarks have been applied.

XII.

Answering paragraph XII, Defendant admits that it uses the name "Alpen Glow" on beer sold in the City and County of San Francisco, State of California, and prominently displays said name as a trademark on said goods and upon numerous delivery wagons and trucks upon the streets of San Francisco; and Defendant admits that a specimen of one of Defendant's labels is shown by Exhibit 3 to said Bill of Complaint; Defendant admits that Exhibit 4 to said Bill of Complaint is a photograph of one of Defendant's trucks; Defendant admits that Exhibit 5 of said Bill of Complaint is a photograph of Defendant's place of business; Defendant is without knowledge as to whether Defendant's goods are sold through identically the same channels and the same retail outlets and/or in the same market in competition with Plaintiff's goods which bear Plaintiff's alleged trademarks; Defendant denies that Plaintiff's goods are genuine "Glow" goods; Defendant is without knowledge and thereupon denies the fact that it has numerous delivery wagons and trucks upon the streets in the "Bay region" bearing the words "Alpen Glow" prominently displayed thereon; Defendant denies that Exhibit 3 to said [19] Complaint is a specimen of

Defendant's imitation "Glow" label, but alleges to the contrary that said Exhibit 3 is a genuine label of Defendant bearing the distinctive trademark "Alpen Glow"; Defendant denies that the photograph of Exhibit 4 of said complaint represents one of Defendant's trucks prominently displaying the "Glow" sign, but alleges to the contrary that said Exhibit 4 is a photograph of one of Defendant's trucks prominently displaying the distinctive trademark of Defendant, "Alpen Glow"; Defendant denies the allegation of said paragraph XII that in addition to the use of the word "Glow" by the Defendant, Defendant has featured the golden color upon its trucks and wagons.

XIII.

Answering paragraph XIII of said Complaint, Defendant denies that Defendant's product is an inferior product to that of Plaintiff and/or sells at a cheaper and cut-rate price.

XIV.

Answering paragraph XIV, Defendant denies that in adopting the name "Alpen Glow" as a trademark, it did so with the unfair and fraudulent intent, scheme and/or plan of passing off its goods bearing the mark "Alpen Glow" as the genuine, or any "Glow" goods of Plaintiff, and/or with the intent and/or purpose of deceiving the public; and Defendant denies that its goods bearing the mark "Alpen Glow" are inferior, and denies that Plain-

tiff's goods are genuine "Glow" goods; and Defendant further denies that its conduct constitutes unfair competition; Defendant is without knowledge as to the fact of each and all of the other allegations of said paragraph XIV, and thereupon denies the same. [20]

XV.

Answering paragraph XV of said Complaint, Defendant admits that an application to register the Trademark "Alpen Glow" was filed in the United States Patent Office on May 12, 1933, for Malt Cereal Beverages having not over the legal alcoholic content, claiming use of said mark since April 7, 1933; and admits that said application was published in the Official Gazette of the Patent Office for October 2, 1934; Defendant further admits that the Plaintiff filed an Opposition proceeding and that an answer was filed in said Opposition proceeding, but Defendant denies that said answer merely alleged that "Alpen Glow" was not so similar to "Golden Glow" as to cause confusion in the trade; Defendant further admits that said Opposition proceeding was dismissed on or about April 20, 1935, on Motion of the Plaintiff herein; that Defendant is without knowledge of any and all of the other alleged facts in said paragraph XV contained and thereupon denies each and every allegation of said paragraph XV not herein admitted.

XVI.

Answering paragraph XVI, Defendant denies that Defendant was about to go out of the beer

business in or about April, 1935, or at any other time since the commencement of the business of marketing beer under the trademark "Alpen Glow"; Defendant is without knowledge as to the fact of any of the other allegations of said paragraph XVI not denied in this paragraph, and thereupon specifically denies each and every of said other allegations.

XVII.

Answering paragraph XVII, Defendant denies that it was fully or at all advised of Plaintiff's alleged trademarks in the premises and denies that it has proceeded to defy any rights of Plaintiff and/or that it has continued and/or resumed [21] and/or threatens to continue wrongful simulation and/or imitation of Plaintiff's alleged trademarks as alleged in said Complaint, or in any other manner whatsoever.

XVIII.

Answering paragraph XVIII of said Complaint, Defendant denies that as a result of wrongful simulation and/or imitation of Plaintiff's "Glow" trademarks, and/or by any threat of Defendant to continue its practice of using the distinctive mark "Alpen Glow", Plaintiff has suffered great or any damage or irreparable injury; Defendant denies that the value of good will of Plaintiff's business in respect to said "Glow" trademarks is in excess of a quarter of a million dollars; Defendant denies that any unlawful acts of Defendant have interfered with Plaintiff's business and/or diverted

profits which of right belong to Plaintiff; and further denies that if the acts of Defendant are not enjoined, Defendant will continue to divert to itself business which rightfully belongs to Plaintiff; and Defendant further denies that Plaintiff has any valid "Glow" trademarks, and denies that Defendant has carried on any practices or committed any acts which are unlawful or wrongful or infringe upon any rights of Plaintiff in any manner whatsoever.

XIX.

Answering paragraph XIX, Defendant denies that Plaintiff is entitled to recover by this suit an amount in excess of Ten Thousand Dollars (\$10,000), or any other amount whatsoever; Defendant is without knowledge as to whether Plaintiff is informed of the extent of use of the name "Alpen Glow" by Defendant, or of the quantity of goods sold thereunder and thereupon Defendant denies said allegation of paragraph XIX. [22]

XX.

And for a further and separate defense, Defendant alleges that the alleged trademarks of Plaintiff, "Glow", "Golden Glow", and "It's the After Glow", and each of them, are descriptive of the goods on which they are alleged to be used by Plaintiff, and that said alleged marks are and each of them is invalid as a trademark.

XXI.

And as a further and separate defense, Defendant alleges that if said trademarks are not descriptive, they are deceptive and Plaintiff comes into Court with unclean hands.

XXII.

And as a further and separate defense, Defendant alleges that the Certificates of Registration of said trademarks alleged by paragraph VII of said Complaint to have been issued by the United States Patent Office are, and each of them is, invalid.

XXIII.

And as a further and separate defense, Defendant alleges that it is the owner of all right, title and interest in and to the Trademark "Alpen Glow" on beer, and of Certificate of Registration thereof in the United States Patent Office; that application was made to the United States Patent Office on May 12, 1933, for registration of said Trademark "Alpen Glow", and that said application was examined by the Commissioner of Patents and was, pursuant to law, passed to publication in the Official Gazette of the Patent Office of the issue of October 2, 1934; that the Plaintiff herein filed Opposition to the grant of said application for registration; that an answer to said Opposition was duly filed; that times were set for taking testimony; that thereafter, to-wit, on or about April 13, 1935, after Defendant had been harassed and annoyed by said

Opposition proceeding for substantially six months, Plaintiff filed a Motion to Dismiss its [23] said Opposition without prejudice, which said Motion was granted by the Examiner of Interferences of the Patent Office on or about April 20, 1935; that by reason of the dismissal by Plaintiff of its Opposition proceeding, Defendant was led to believe and did believe that Plaintiff did not object or had withdrawn all objection to the use by Defendant of the Trademark "Alpen Glow" on its goods as aforesaid, and Defendant relying upon the dismissal of said Opposition proceeding and believing it had a lawful right to use the Trademark "Alpen Glow", proceeded at great expense of time and money to develop a substantial, lucrative, and expanding business by use of said trademark on beer; that Plaintiff and its officers have been informed that Defendant intended to use the Trademark "Alpen Glow" as a trademark on beer and did not object thereto and have waited for a long period of time, to-wit, until December 17, 1935, and until Defendant has built up a valuable and growing good will before bringing this suit; that Defendant, by the said acts of Plaintiff, was thereby encouraged to continue to use the mark "Alpen Glow" on beer and to expend money and time in building up a valuable and increasing business thereunder; and that Plaintiff is guilty of laches as a bar to this suit; and that Plaintiff is estopped by its acts to contest the right of Defendant to continue to use its said Trademark "Alpen Glow" on beer.

XXIV.

And as a further and separate defense, Defendant alleges that after the application for registration of said Trademark "Alpen Glow", set forth in the next preceding paragraph hereof, had been duly examined by the Commissioner of Patents and after all proceedings were duly had and taken, which are by law required to be had and taken prior to the registration of trademarks in the United States Patent Office, and notwithstanding the registrations of trademarks alleged to be owned by Plaintiff, the Commissioner of Patents duly issued Certificate of Trademark Registration [24] No. 325,342, dated June 18, 1935, for the Trademark "Alpen Glow" for Malt Cereal Beverages Having Not Over the Legal Alcoholic Content, in Class 48 of Malt Beverages and Liquors; that at all times since the grant of said Certificate of Registration, Defendant has been and now is the owner of all right, title and interest in and to said Certificate of Registration of the Trademark "Alpen Glow", in the United States Patent Office, and of all common law rights in the good will of business built up and acquired under said Trademark by its use on beer.

XXV.

And as a further and separate defense, Defendant alleges that Defendant's Trademark "Alpen Glow" clearly differentiates the origin of Defendant's goods from the goods of Plaintiff, and that Defendant has a lawful right to use on its labels the said mark "Alpen Glow".

XXVI.

And as a further and separate defense, Defendant alleges that said Complaint fails to state a cause of action in Equity for infringement of valid trademarks validly registered in the United States Patent Office, and/or for unfair competition, and further alleges that said Bill of Complaint herein is multifarious in attempting to join a federal cause of action for infringement of trademarks registered in the United States Patent Office and a separate and distinct non-federal cause of action for unfair competition.

Wherefore, Defendant prays that said Bill of Complaint may be dismissed and that Defendant may have such other and further relief as may be equitable, together with a judgment for costs of suit.

MILONAS & SONS, INC.,

By JOHN MILONAS,

Its President.

WM. S. GRAHAM,

57 Post Street,

San Francisco, California,

Attorney for Defendant. [25]

OATH

State of California

City and County of San Francisco—ss.

John Milonas, being first duly sworn, deposes and says that he is president of Milonas & Sons, Inc., a

corporation, Defendant in the above-entitled action; that he has read the foregoing Answer to Bill of Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief and as to those matters he believes them to be true.

JOHN MILONAS.

Subscribed and sworn to before me this 28th day of May, 1936.

[Seal]

CHAS. F. DUISENBERG,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires Aug. 20, 1936.

Receipt of a copy of the foregoing Answer of Defendant to Bill of Complaint acknowledged this 28th day of May, 1936.

CHAS. E. TOWNSEND,

ROY C. HACKLEY, JR.,

Attorneys for Plaintiff.

[Endorsed]: Filed May 28, 1936. [26]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER OF DEFENDANT

Now comes the Defendant above-named and files this amendment to its Answer to the Bill of Complaint herein, by adding a new paragraph as follows: [27]

XXVII.

And as a further and separate defense, Defendant alleges on information and belief that other persons, firms or corporations have for many years last past used, and now use, the marks here in suit on labels for Beer; that such use is public and well-known to Plaintiffs, and Plaintiffs have consented to and authorized such use; that, without prejudice to naming additional parties if discovered, the name or names of whom will be given to Plaintiff at least thirty days before trial, Defendant alleges one of said other users is Blumer Brewing Corporation of Monroe, Wisconsin, the latter being the only such party known to Defendant at this time; that such use by others by and with the consent of Plaintiffs has deprived such marks of any distinctive character as indicating the origin of Plaintiff's products only and the good will of Plaintiff's business; that such consent by Plaintiffs to use by others of such marks on similar goods constitutes abandonment by Plaintiff of any Trademark rights therein.

WM. S. GRAHAM

Attorney for Defendant.

The foregoing Amendment to Answer of Defendant may be filed by agreement of counsel for the parties, the attorneys for Plaintiff acknowledging that they have received copy thereof this 28th day of September, 1936, plaintiff, however, reserving all objections as to materiality, competency,

relevancy and substance of allegations in said amendment.

CHAS. E. TOWNSEND
ROY C. HACKLEY, JR.
Attorneys for Plaintiff
WM. S. GRAHAM

Attorneys for Defendant.

ORDER

Leave to File granted this 30th day of September, 1936.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Sept. 30, 1936. [28]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW PURSUANT TO EQUITY RULY 70¹/₂

This cause having come on to be heard before the Court and having been brought to a final hearing upon the pleadings and [29] proofs and evidence, oral and documentary, adduced by both parties, and counsel for the respective parties having submitted briefs, and the cause having been fully considered by the Court, and the Court having heretofore made its order in favor of plaintiff herein; now, in accordance with the pleadings and proofs presented, the Court makes the following Findings

of Fact and Conclusions of Law, the same to represent, as well, the opinion of the Court in this cause:

Findings of Fact

I.

That the plaintiff, Golden West Brewing Company, is a corporation duly organized and existing under and by virtue of the laws of the State of California, with a regular and established place of business in the City of Oakland, County of Alameda, State of California; and that plaintiff was incorporated on the 25th day of May, 1910, as the successor to the following breweries:

Washington Brewery,
Anchor Brewery,
Raspillar Brewing Company,
Palmtag and Meyer Brewing Company, and
Palace Brewery;

and that about the year 1915 there was merged with the plaintiff, the Richmond Brewery which had carried on a similar business for a period of about forty (40) years.

II.

That the defendant, Milonas & Sons, Inc., is a California corporation, chartered on or about September 13, 1934, succeeding to partnership known as Milonas & Sons, said corporation having a regular and established place of business at 1960 Folsom Street, in the City and County of San Francisco, State of California, and carrying on said business

under the fictitious name and style of General Enterprise Company and Willows Brewing Company.

[30]

III.

That the jurisdiction of this Court is based upon the Trademark Laws of the United States.

IV.

That Plaintiff is engaged in the business of brewing and marketing malt beverages and has so continuously been engaged since its incorporation, and through its various predecessors in interest since about the year 1856 (Tr. 6); that the products of plaintiff have been marketed generally and extensively not only throughout the State of California, but in interstate commerce, especially throughout all the Western States of the United States, as well as Alaska, Hawaii, and the Philippine Islands (Tr. 20).

V.

That through a long course of honorable dealing on the part of plaintiff and its aforesaid predecessors, and because of the excellence of plaintiff's products, plaintiff has acquired a valuable goodwill, with the result that for many years last past, the reputation and consequent demand for plaintiff's products have been extended to and now are well established throughout the territory of all the Western States of the United States, as well as Alaska, Hawaii, and the Philippine Islands.

VI.

That the plaintiff is the owner of all the right, title and interest in and to certain trademarks and the registrations thereof in the United States Patent Office, as follows:

United States Trademark, Certificate No. 231,842, registered August 30, 1927, "It's the After Glow", for malt beverages, extracts and liquors, with not more than the legal alcoholic content;

United States Trademark, Certificate No. 231,843, registered August 30, 1927, "Golden Glow", for malt beverages, extracts and liquors, with not more than the legal alcoholic content;

[31]

United States Trademark, Certificate No. 232,983, registered September 20, 1927, "Golden Glow", for malt beverages, extracts, and liquors, with not more than the legal alcoholic content;

United States Trademark, Certificate No. 307,484, registered October 24, 1933, "It's the After Glow", for malt beverages, extracts and liquors, with not more than the legal alcoholic content;

United States Trademark, Certificate No. 322,361, registered March 5, 1935, "Golden Glow", for malt beverages, extracts, and liquors, with not more than the legal alcoholic content;

which said Trademarks have been applied to plaintiff's malt beverage goods and have been continuously used on said goods in interstate and intrastate commerce since as early as July, 1925;

That the plaintiff is also the owner of a Certificate of Registration of Trademark in the United States as follows:

United States Trademark, Certificate No. 307,486, registered October 24, 1933, "Glow", for malt beverages, extracts and liquors, with not more than the legal alcoholic content;

which said mark has been used by plaintiff on its malt beverage goods continuously since the 7th day of April, 1933.

That said marks and each of them have been applied to the goods by means of printing same on labels, crown caps and/or cartons and containers attached to or associated with said goods.

VII.

That plaintiff has complied with the Statute (Section 28 of the Trademark Act of February 20, 1905) by marking its trademarked beer on some of its labels with the legend:

"Reg. U. S. Pat. Off."

since at least as early as March 1, 1934 (Tr. 144).

[32]

VIII.

That since the year 1925 plaintiff has done a business in the manufacture and sale of beer and

ale (including near beer during the Prohibition era), under said "Golden Glow" trademark, in excess of Twelve Million Eight Hundred Thousand Dollars (\$12,800,000.00), representing a volume of Twenty-Three Million Two Hundred Fifty-three Thousand (23,253,000) gallons, and has expended in advertising its said products under said trademark "Golden Glow", a sum in excess of Six Hundred Thirty Thousand Dollars (\$630,000.00) (Tr. 35-36). Further, that at the present time Sixty-five per cent (65%) of all of plaintiff's beverages bear the crown cap "Glow" (Tr. 20).

IX.

That by reason of the excellence of the quality of the malt beverages of plaintiff and of its predecessors in interest, extending over a long period of time, there has been created a valuable good-will in connection therewith, particularly in the aforesaid trademarks of plaintiff under which its products are and have been marketed; that the trademark or trade name or names "Golden Glow", and "It's the After Glow", as applied to malt beverages having not over the legal alcoholic content, have long been definitely identified with the plaintiff; and that said malt beverages are sold in grocery and other stores, and have, by reason of their long identification with plaintiff, come to mean, and for many years last past have meant, in the grocery trade and among the public who have occasion to buy such goods, that such products bearing said

trademarks, are the products of plaintiff and of no one else. [33]

X.

That defendant, with knowledge of plaintiff's trademark "Golden Glow" on near beer, adopted the name "Alpen Glow" for beer and applied it to beer (a malt beverage); and that since April 7, 1933 (Tr. 83) defendant has continuously sold beer in interstate commerce under its "Alpen Glow" label and designation.

XI.

That the defendant is not a manufacturer or brewer of beer, but is a distributor for beer of other concerns (one of which is Schlitz Beer), and also packages beer and non-alcoholic beverages under its own label "Alpen Glow". It has its beer manufactured for it by others and more especially by the San Francisco Brewery, formerly Milwaukee Brewing Company of San Francisco; defendant supplying the labels to be placed by the manufacturer upon said beer and later sold by defendant as defendant's "Alpen Glow" beer.

XII.

That the president of defendant corporation had known of plaintiff's "Golden Glow" trademark on beer from a date prior to defendant's incorporation on September 13, 1934 (Tr. 97) and had known of the use of said "Golden Glow" trademark on near beer prior to the repeal of Prohibition (Tr. 97).

XIII.

That the corporate defendant's predecessor in business, to-wit, the partnership of John Milonas & Sons, commenced the selling of beer on April 7, 1933, immediately when it became legal to sell beer of recognized full alcoholic strength, and applied thereto, on said date, the trademark "Alpen Glow", and has continued to use said mark on beer since said date, in sales in interstate and intrastate commerce. [34]

XIV.

That the facts relating to the adoption by defendant's predecessor of the Trademark "Alpen Glow" are that in 1932 John Milonas, a member of the partnership which was defendant's predecessor, and who is present president of the corporate defendant, decided to enter the beer business when and if it became legal to sell full-alcoholic-content beer. In December, 1932, he went to a label-maker, Louis Roesch & Co., and discussed with Mr. Roesch the making of labels and a name to be used on the beer. Louis Roesch & Co. was at that time manufacturing "Golden Glow" labels for plaintiff. Mr. Louis Roesch of that company showed Mr. Milonas a large number of sample labels, including a label for "Alpenweiss" beer, and suggested that Mr. Milonas adopt and employ the name "Alpen Glow." Mr. Milonas, at the suggestion of Mr. Roesch looked up the word "Alpen Glow" in the dictionary, and decided to adopt it. In December, 1932, he had Jack-

son & Webster make a trademark search for him as to the availability of the mark "Alpen Glow" for registration in the Patent Office, the report thereon being that the mark "Alpen Glow" was available as a trademark for malt beverages (at that time near beer). Louis Roesch & Co. then made a proof of a proposed "Alpen Glow" label. In February, 1932, and prior to any use by defendant of the "Alpen Glow" label on goods in commerce, Milonas called on Mr. Carl S. Plaut, who was then General Manager of the plaintiff, Golden West Brewing Company. Milonas had been referred to Mr. Plaut by a San Francisco bank, which had installed Mr. Plaut as General Manager of plaintiff's brewery. Milonas requested said General Manager Plaut to give him a distributor's right to distribute "Golden Glow" beer in San Francisco, and also requested that the plaintiff corporation pack beer for him under his own [35] "Alpen Glow" label. Milonas exhibited his "Alpen Glow" label to said General Manager, who told Milonas the label looked nice, and was an attractive label for beer. Said General Manager made no objection to the use of the "Alpen Glow" label, nor did he approve it. The plaintiff, Golden West Brewing Company, refused to make Milonas a distributor for "Golden Glow" beer in San Francisco, and said company also declined to pack beer for him under his "Alpen Glow" label. Milonas then made arrangements with the Milwaukee Brewery (now the San Francisco Brewing Co.) to pack his beer under the "Alpen Glow"

label. The date when full-alcoholic-content beer became legal is stipulated as April 7, 1933; that since said date of April 7, 1933, the sales of Milonas, and his successor, defendant herein, have been continuous.

XV.

That defendant adopted and has used its mark "Alpen Glow" in good faith and without wrongful or fraudulent intent, but that defendant was never given, nor has it ever had, a license, written or oral, from plaintiff to use the word "Glow" or any combination or words wherein the word "Glow" was present.

XVI.

That on May 12, 1933, Milonas and Sons applied for registration in the Patent Office of their mark "Alpen Glow" for beer; that the Patent Office made its examination of said application and passed it to publication in the Official Gazette of October 2, 1934; that on October 26, 1934, the plaintiff filed an Opposition to the grant of such registration; that on April 9, 1935, plaintiff made a Motion to Dismiss its Opposition without prejudice, which Motion was granted on April 20, 1935; whereupon the Patent Office granted said Milonas' application for registration, and issued Certificate of Registration No. 325,342 on June 13, 1935. [36]

XVII.

That at least as early as the aforesaid Opposition, October 26, 1934, plaintiff felt that it was

aggrieved by defendant's use of the "Alpen Glow" mark.

XVIII.

That the said registration in the Patent Office of defendant's mark "Alpen Glow" was granted to Milonas, notwithstanding the fact that all of the trademark registrations relied upon by plaintiff in this suit were then of record in the Patent Office.

XIX.

That defendant by its use of the mark "Alpen Glow" designating its beverages has used a phrase which was likely to mislead the public, and to take advantage of and to trade unlawfully on plaintiff's name and reputation; and that said possible deception and misrepresentation of defendant may have created confusion in the trade by giving the public the wrongful impression that the defendant's products originate from plaintiff, and defendant may have led the public to believe that the goods sold by it were those of the plaintiff.

XX.

That beer marketed by defendant under the trademark "Alpen Glow" is sold for a price less than that of plaintiff's beer.

XXI.

That the dominant feature of plaintiff's marks, as well as of defendant's mark "Alpen Glow", is the word "Glow". [37]

XXII.

That defendant in seeking its registration for "Alpen Glow" in the United States Patent Office represented to the Commissioner of Patents that as to the trademark "Alpen Glow", "the word 'Glow' is basic" and "moreover the word 'Alpen' is an adjective and is not the prominent word feature." (Exhibit 23, Paper No. 7).

XXIII.

That the defendant's mark "Alpen Glow" is not confusingly similar to plaintiff's mark "It's the After Glow" nor plaintiff's combination mark "Golden Glow—It's the After Glow", and design, and those marks and the aforesaid registrations thereof are valid, but not infringed.

XXIV.

That the defendant's mark "Alpen Glow" is confusingly similar to plaintiff's mark "Golden Glow" in the predominating word "Glow" and the said mark of plaintiff and the aforesaid registration thereof are valid and infringed.

XXV.

That the plaintiff began using the mark "Glow", standing alone, on April 7, 1933; that the defendant began using its mark "Alpen Glow" on April 7, 1933. That the plaintiff had on March 18, 1933, ordered from Western Stopper Company thirty thousand (30,000) gross (four million three hun-

dred twenty thousand—4,320,000) of “Glow” crown caps at a cost of six thousand five hundred twenty-five dollars (\$6,525.00); the first of which were delivered to plaintiff on April 1, 1933 (Tr. 147; Exhibit 35); that by defendant’s Exhibit X (Tr. 82), defendant ordered its first “Alpen Glow” labels from Louis Roesch March 20, 1933, and received its first shipment of said labels April 3, 1933. [38]

XXVI.

That defendant represents to the Court, subsequent to Final Hearing, that it has on hand the following inventory of “Alpen Glow” containers and labels for beer:—

Filled cans of Beer in lithographed cans	
(24 to the case)	500 cases
Filled bottles of Beer	
(24 to the case)	1,675 cases
Lithographed empty cans for Beer	
(24 to the case)	10,783 cases
Paper labels on hand for Beer bottles, sufficient for 22,957 cases of 24 bottles each.	

XXVII.

That there is no confusing similarity of dress of goods, labels, or packages between the respective goods of plaintiff and defendant, other than the similarity of the predominating word “Glow” in the respective marks “Golden Glow” and “Alpen Glow”. [39]

Conclusions of Law.

I.

That this Court has jurisdiction of this cause under the Trademark laws of the United States.

II.

That plaintiff's Trademark, "It's the After Glow" and the registrations thereof in the United States Patent Office under Certificates No. 231,842 and No. 307,434, are valid and not infringed by defendant.

III.

That plaintiff's Trademark consisting of the combination "Golden Glow—It's the After Glow" and a design, as registered in the United States Patent Office under Certificate No. 231,843, is valid and is not infringed by defendant.

IV.

That plaintiff's Trademark "Glow" and the registration thereof in the United States Patent Office are valid and infringed.

V.

That plaintiff's Trademark "Golden Glow" and registrations thereof in the United States Patent Office, Certificates No. 232,983 and No. 322,361, are valid and are infringed by defendant's use of the word "Glow" in the mark "Alpen Glow" on beer.

VI.

That plaintiff is entitled to a Decree for an Injunction against defendant's use of the word

“Glow” in its mark “Alpen Glow”, subject, however, to the provisions of the next succeeding paragraph, numbered VII, which proviso shall be included in any Injunction issued pursuant thereto.

[40]

VII.

That it would be inequitable to enjoin defendant from using up and disposing of its present inventory of goods, containers, labels, and bottle caps bearing the mark “Alpen Glow”, except within a reasonable time, which the Court concludes and fixes as not later than September 30, 1938.

VIII.

That it would be inequitable to award an accounting to plaintiff for profits or damages and an accounting is therefore denied.

IX.

Defendant shall pay costs.

X.

The plaintiff is entitled to a Decree in accordance with the foregoing Findings of Fact and Conclusions of Law.

The foregoing Findings of Fact and Conclusions of Law are approved this 31st day of May, 1938, and any exception which is necessary or desirable to preserve the rights of the parties may be considered as having been duly taken regardless of which

party proposed the foregoing Findings and Conclusions or any of them.

MICHAEL J. ROCHE

United States District Judge

[Endorsed]: Filed May 31, 1938. [41]

In the United States District Court for the Northern District of California, Southern Division.

In Equity No. 3969-R

GOLDEN WEST BREWING COMPANY, a corporation,

Plaintiff,

vs.

MILONAS & SONS, INC., a corporation, operating under the fictitious styles of "Willows Brewing Co." and "General Enterprise Co.",
Defendant.

FINAL DECREE

This cause came on to be heard at final hearing on the pleadings and proofs of both parties and briefs submitted by counsel. Thereupon, upon consideration thereof, it is ordered, adjudged and decreed:

[42]

I.

That this Court has jurisdiction of this cause under the Trademark Laws of the United States.

II.

That plaintiff is the owner of the following trademarks and certificates of registration therefor, as the same are applied to malt beverages:

Trademark "Golden Glow" U. S. Registration No. 232,983. Dated September 20, 1927.

Trademark "Golden Glow" U. S. Registration No. 322,361. Dated March 5, 1935.

Trademark "Glow" U. S. Registration No. 307,486. Dated October 24, 1933.

Trademark "Golden Glow—It's the After Glow" U. S. Registration No. 231,843. Dated August 30, 1927.

Trademark "It's the After Glow" U. S. Registration No. 307,484. Dated October 24, 1933.

III.

That the defendant has, since the 7th day of April, 1933, and with notice of plaintiff's trademark "Golden Glow", infringed upon plaintiff's said registered trademark "Glow", and has infringed upon plaintiff's registered trademark "Golden Glow" by the use of the word "Glow" in defendant's "Alpen Glow" label on its malted beverages, and by the publicizing of defendant's said product under the name "Alpen Glow".

IV.

That defendant has not infringed the plaintiff's registered trademark consisting of the combination "Golden Glow—It's the After Glow" registered under certificate No. 231,843, nor plaintiff's said registered trademark "It's the After Glow", [43] registered under certificate No. 307,484.

V.

That a writ of injunction issue out of and under the seal of this Court directed to the defendant, perpetually enjoining and restraining said defendant, its officers, directors, associates, attorneys, clerks, servants, agents, workmen, employees, confederates and those in privity with each of the same, from directly or indirectly employing the word "Glow" or any colorable imitation thereof as a trademark or trade name in the advertising or sale of its malted beverages. However, said injunction is stayed until such time as is necessary for defendant to use up and dispose of its present inventory of goods, containers, labels and bottle caps bearing the mark "Alpen Glow"; or not later than September 30, 1938.

VI.

That an accounting to plaintiff for profits or damages is denied.

VII.

That plaintiff recover from defendant the costs of plaintiff in this Court, in the amount of \$125.35,

and that plaintiff shall have judgment and execution against said defendant for said costs.

MICHAEL J. ROCHE

United States District Judge.

Dated: June 14th, 1938.

Approved as to form as provided under Rule 22.

WM. S. GRAHAM

Attorney for Defendant.

[Endorsed]: Filed June 15, 1938. [44]

[Title of District Court and Cause.]

NOTICE OF AND DEMAND FOR PAYMENT
OF COSTS.

To: Milonas & Sons, Inc., defendant, and to William S. Graham, its attorney: [45]

Whereas, under order of this court entered upon the 15th day of June, 1938, it was adjudged and decreed among other things that plaintiff recover from defendant in this cause the sum of One Hundred and Twenty Five and Thirty Five One Hundredths Dollars (\$125.35) as costs.

Now Therefore, plaintiff hereby demands of defendant that said defendant make a full payment of costs as aforesaid totaling the sum of One Hundred Twenty Five and Thirty Five One Hundredths Dollars (\$125.35), and notice is hereby given that unless said sum is paid on or before 12 o'clock

Noon, June 20, 1938, that plaintiff will have a writ of execution and attachment issued against said defendant for the sum of said costs hereinabove set forth, together with such additional expense as may be necessary in connection therewith.

CHAS. E. TOWNSEND

ROY C. HACKLEY, JR.,

Attorneys for Plaintiff.

Dated: June 17, 1938.

Receipt of a copy hereof is hereby acknowledged this 17th day of June, 1938.

WM. S. GRAHAM

Attorney for Defendant.

[Endorsed]: Filed Dec. 22, 1938. [46]

[Title of District Court and Cause.]

SATISFACTION OF JUDGMENT FOR COSTS

Final Decree in the above-entitled cause having been entered herein on June 14, 1938, awarding Judgment for Costs in favor of the Plaintiff and against the Defendant in the sum of One Hundred Twenty Five Dollars and Thirty-Five Cents (\$125.35), and said sum having been paid by the Defendant to the Plaintiff, Satisfaction of Judgment for said costs is hereby acknowledged, and the Clerk of Court is requested to enter this Satisfaction of Judgment in the records of the cause.

Dated: San Francisco, California, June 21st, 1938.

GOLDEN WEST BREWING
COMPANY

By CHAS. E. TOWNSEND

ROY C. HACKLEY, JR.

Attorneys for Plaintiff.

[Endorsed]: Filed June 22, 1938. [47]

[Title of District Court and Cause.]

WRIT OF PERPETUAL INJUNCTION.

In the United States of America,
Northern District of California,
Southern Division—ss.

The President of the United States of America to
Milonas & Sons, Inc., a corporation, operating
under the fictitious styles of "Willows Brew-
ing Co." and "General Enterprise Co."
Greeting: [48]

Whereas, Golden West Brewing Company, a cor-
poration has filed on the Chancery side of the Dis-
trict Court of the United States for the Southern
Division of the Northern District of California, a
bill against Milonas & Sons, Inc., a corporation
operating under the fictitious styles of "Willows
Brewing Co." and "General Enterprise Co."; and
pursuant to final decree dated June 14, 1938, have
obtained an allowance of injunction;

Now, Therefore, we further having respect to the
matters in said Bill contained, do hereby strictly

command and perpetually enjoin and restrain you, Milonas & Sons, Inc., a corporation, operating under the fictitious styles of "Willows Brewing Co." and "General Enterprise Co.", your officers, directors, associates, attorneys, clerks, servants, agents, workmen, employees, confederates and those in privity with each of them from directly or indirectly employing the word "Glow" or any colorable imitation thereof, as a trade mark or trade name in the advertising or sale of its malted beverages.

Hereof Fail Not Under the Penalty Which May Ensnue.

Witness, the Honorable Michael J. Roche, Judge of the District Court of the United States of America for the Northern District of California, Southern Division, this 10th day of October, in the year of our Lord One Thousand Nine Hundred and Thirty Eight, and of our Independence the One Hundred Sixty-third year.

[Seal]

WALTER B. MALING

Clerk of the United States
District Court.

By C. C. EVENSEN

Deputy Clerk.

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California—ss:

I hereby certify and return that I served the annexed Writ of Perpetual Injunction on the therein-

named Milonas & Sons, Inc., et al., by handing to and leaving a true and correct copy thereof with Mr. A. J. Milonas personally at San Francisco, Calif., in said District on the 11th day of October, A. D. 1938.

GEORGE VICE

U. S. Marshal.

By HERBERT R. COLE

Deputy.

Marshal's Fees

Travel \$.10

Service \$2.00

\$2.10

[Endorsed]: Filed Oct. 14, 1938. [49]

[Title of District Court and Cause.]

TRANSCRIPT OF EVIDENCE PURSUANT
TO RULE 75.

Before Hon. Michael J. Roche

United States District Judge

San Francisco, California,

Beginning March 24, 1938.

Concluded March 26, 1938.

Appearances: Charles E. Townsend, Esq., and
Roy C. Hackley, Jr., for Plaintiff.
William S. Graham, for defendants.

[50]

In the course of opening statements of counsel, it was said:

Mr. Hackley: This is a case involving charges of trademark infringement, and unfair competition. The two causes of action have been joined in a single complaint by the plaintiff, Golden West Brewing Company, a California corporation, against a group of defendants, which appear to be more or less the same people.

The plaintiff is the owner of various United States trademarks, registrations duly registered in the United States Patent Office, for the three particular trademarks, "Glow", "Golden Glow", and "It's the After Glow", all used in connection with beer. The defendant uses its trademark "Alpen Glow" on an identical product, beer. The two products, as we will show, are sold in open competition with each other.

Mr. Graham: The defendant in this case is a corporation, John Milonas & Sons, Inc.; that corporation succeeded to the business of John Milonas & Sons, a partnership. The partnership started out to do business, being an association of four or five parties, under the name of General Enterprise Company, and when they incorporated they continued to do business as the General Enterprise Company.

The business of the defendant was established in 1933, just as soon as they could be legally established for the purpose of selling beer. The defendant, in good faith, through its predecessor, the partnership, undertook to have labels made as early as 1932, in the preparation for going into the beer business. It was April 7, 1933, before beer could be

legally dispensed. The plaintiff had knowledge of the adoption of the label by the defendant. The defendant put its product on the [51] streets of San Francisco even prior to April 7, 1933, and developed a good business continuously until the present time. Defendant applied for registration of trademark, and that registration was opposed by the plaintiff corporation, and thereafter it withdrew its opposition without prejudice, but those things have led the defendant to believe that the plaintiff had no objection to its use of the mark. The Patent Office has granted previous registrations and has granted subsequent registrations, including the word "Glow", to other parties than the plaintiff. The marks of the plaintiff are descriptive of the characteristics of the product and therefore they are invalid.

GEORGE J. WHITE

called as a witness on behalf of plaintiff and testified as follows: [52]

Direct Examination.

Mr. White: I reside at 419 Euclid Avenue, Oakland, California. I am president of the Golden West Brewing Company of Oakland, and have been president of that Company since 1910.

The Golden West Brewing Company was formed in 1910. The Company had its origin in the old Washington Brewery Company of Oakland, Cali-

(Testimony of George J. White.)

ifornia, founded in 1887. That Company succeeded to the Washington Brewery founded in 1856. The Golden West Brewing Company as it was formed in 1910, resulted from the consolidation of five breweries, the Washington Brewery, the Raspiller Brewing Company, the Anchor Brewery, Palmtag & Meyer Brewing Company, and Palace Brewery.

I started in the brewery business in 1892, with the New York Malt House, and went into the brewery business in Oakland, in 1902, as president of the Washington Beer and Malt Company.

By stipulation, the following United States trademark registrations issued to plaintiff were offered and received in evidence.

Exhibit #1—Trademark registration 232,983, September 20, 1927, for the trademark "Golden Glow".

Exhibit #2—Trademark registration 231,842, August 30, 1927, for the trademark "It's the After Glow".

Exhibit #3—Trademark registration 231,843, August 30, 1927, for the combination "Golden Glow" and "It's the After Glow".

Exhibit #4—Trademark registration 307,484, October 24, 1933, for the trademark "It's the After Glow".

Exhibit #5—Trademark registration 307,486, October 24, 1933, for the trademark "Glow". [53]

Exhibit 6—Trademark registration 322,361, March 5, 1933, for the trademark "Golden Glow".

(Testimony of George J. White.)

The foregoing trademark registrations all issued to plaintiff.

Certificate of title dated March 17, 1938, to trademark registration 232,983, plaintiff's Exhibit 1-A.

Certificate of title dated March 17, 1938, to trademark registration 231,842, plaintiff's Exhibit 2-A.

Certificate of title dated March 17, 1938, to trademark registration 231,843, plaintiff's Exhibit 3-A.

Certificate of title dated March 17, 1938, to trademark registration 307,484, plaintiff's Exhibit 4-A.

Certificate of title dated March 17, 1938, to trademark registration 307,486, plaintiff's Exhibit 5-A.

Certificate of title dated March 17, 1938, to trademark registration 322,361, plaintiff's Exhibit 6-A.

Certificates of title, Exhibits 1-A to 6-A show title [54] to be vested as of March 17, 1938, in Golden West Brewing Company, Oakland, California.

The Witness: The above listed trade-mark registrations have not at any time been transferred by Golden West Brewing Company from the time of exercise thereof in 1927, 1933 or 1935, as the case may be, and those trade-mark registrations are the exclusive property of Golden West Brewing Company today.

Golden West Brewing Company is a California corporation, organized in 1910, and possessing the same corporate character and name today as when organized. The Franchise Tax and other taxes of the corporation are, at this time, duly paid, thereby

(Testimony of George J. White.)

to enable the corporation to maintain its corporate status.

I am familiar with the various labels that the Golden West Brewing Company has used on its products. Labels employing the names "Golden Glow", "Glow" and "It's The After Glow", were first used by Golden West Brewing Company, the plaintiff, in June 1925. I have brought to the Court Room this morning, specimens of the majority of all labels used by my concern from 1925 to the present time, employing the names "Golden Glow", "Glow" and "It's The After Glow". I have prints of each of these labels or facsimiles here to be produced.

Thereupon, Witness produced and identified and there were offered and received in evidence as Plaintiff's Exhibits in the manner noted, the following labels and label specimens:

Facsimile of Golden Glow label adopted June 1925, Plaintiff's Exhibit 7.

Golden Glow label on bottle as used in commerce with cap or crown in place as adopted in place of Exhibit 7, [55] Plaintiff's Exhibit 8.

Bottle, label and cap adopted April 1933 for use on beer of full alcoholic strength as legalized in April 1933,—Plaintiff's Exhibit 9.

Bottle, label and cap for Golden Glow Ale adopted in 1934—Plaintiff's Exhibit 10.

Bottle, label and cap adopted 1936—Plaintiff's Exhibit 11.

(Testimony of George J. White.)

Bottle, label and cap for Golden West Stout adopted 1935,—Plaintiff's Exhibit 12.

Bottle, label and cap for Golden Glow hock beer adopted 1934,—Plaintiff's Exhibit 13.

Steinie bottle, label and cap for Golden Glow, Plaintiff's Exhibit 14.

Green bottle, label and cap for Golden Glow ale in steinie bottle,—Plaintiff's Exhibit 15.

Ale label on steinie bottle with cap in place—Plaintiff's Exhibit 16.

Golden Glow beer can with lithographed label—Plaintiff's Exhibit 17.

Golden Glow ale can with lithographed label—Plaintiff's Exhibit 18.

Golden Glow ale, green label, bottle, label and cap—Plaintiff's Exhibit 19.

Golden Glow ale, bottle, label and cap—Plaintiff's Exhibit 20.

The Witness: Plaintiff's Exhibit 7 was adopted by Golden West Brewing Company about June 1925. It was immediately used in inter-state commerce on beer bottles.

Golden West Brewing Company has been dealing in beer [56] in inter-state commerce under "Golden Glow" and "It's The After Glow", from 1925, to the present time.

Plaintiff's Exhibit 8 was adopted in April 1933 when beer of full alcoholic strength was legalized. Plaintiff's Exhibit 8 includes the cap with the word "Glow" appearing thereon. Exhibit 8, including

(Testimony of George J. White.)

label and cap was used in the form shown in the Exhibit in April 1933.

Exhibits 7 to 20 are representative of the various labels that have been brought out by the Golden West Brewing Company employing the trade names "Golden Glow", "Glow" or, "It's the After Glow" as trade marks during the period 1925 to the present time. All of these labels have been used on beer sold in inter-state commerce.

Before April 7, 1933, beer of the requisite alcoholic strength, one-half of one percent, was sold under the Golden Glow labels indicated. After April 7, 1935, full alcoholic content beer was sold under these labels. The latter beer has been sold under the Golden Glow labels from April 7, 1933 to date.

In connection with its advertising program, Golden West Brewing Company has used the word "Glow" alone, predominantly. We have quite a large electric sign on top of our beer brewing building, which displays the word "Glow", and at night alternates with a flash, "ale". "Ale" does not show in the day time. That sign was installed on our plant in September 1935. I have here, the contract for construction of the sign dated September 16, 1935. The sign was put in place and in operation within a couple of weeks after the contract was signed.

There was offered and received in evidence as Plaintiff's Exhibit 21, additional sales contract

(Testimony of George J. White.)

dated September 16, [57] 1935, for installation of a large electric sign on the Golden West Brewing Company plant in Oakland;—the sign displaying the trade mark “Glow”.

The Witness: The photograph, Plaintiff’s Exhibit 2 attached to the Bill of Complaint in this case, shows the Glow sign that I have been referring to, in place on the stock house of the Golden West Brewing Company at Seventh and Kirkham Streets, Oakland, California. The letters on the sign are about ten feet high.

There was then offered and received in evidence as Plaintiff’s Exhibit 22, a photograph of Plaintiff’s “Glow” sign.

The Witness: Over the period from 1925 to date approximately sixty breweries have been engaged in the manufacture and sale of beer competitively with our concern, in the territory in which we have been operating. About thirty are manufacturing beer today in comeptition with us in the territory in which we are operating.

Golden West Brewing Company holds fourth or fifth place in point of volume of sales and dollar volume of sales among the concerns in the territory in which we have been selling beer under the name “Golden Glow” and “Glow”. That has been a more or less consistent rank during the period from 1925 to the present time. There are approximately one hundred brands of beer on the market at the present time in our competitive territory. In point of vol-

(Testimony of George J. White.)

ume of sales our brand ranks fourth or fifth. In the sale of beer under the registrations "Glow" and "Golden Glow" and "It's the After Glow", Golden West Brewing Company covers California, Oregon, Washington, Nevada, Utah, Arizona, Philippine Islands, Honolulu, Alaska, [58] Guam, and Midway.

In Exhibits 9 and 11, as well as Exhibit 14, I have indicated three numbers, on the caps of each of which we use the registered trade-mark "Glow" in large type. The percentage of our beer which is sold under the labels and caps of that character is sixty-five per cent. The purpose in adopting and placing on the cap the word "Glow" alone was that it was a word we liked for advertising, and it was easy to see in the boxes and ice cases of the stores.—

Q. The word "Glow" stands out very prominently?

A. Stands out.

Q. What manufacturer does the word "Glow" indicate or point to when seen on the bottle cap, Mr. White?

A. The Golden Glow or Golden West Brewing Company.

Mr. Graham: That is objected to, and I move to strike out the answer of the witness. The objection is it calls for the conclusion of the witness. What does it mean, to whom? Does it mean to the public, or does it mean to the storekeeper, or who?

(Testimony of George J. White.)

Mr. Hackley: In the question to the witness it means to him, the president of an outstanding corporation.

Mr. Graham: There is no objection if the question is limited solely to what the word means to the witness.

Cross Examination

Mr. Graham: Q. Mr. White, why did you say that "Glow" means Golden Glow?

A. Well, it does mean Golden Glow. People say, "Give me a bottle of Glow".

Q. Why, in your mind, does "Glow" mean Golden Glow?

A. Well, the consumer asks for Golden Glow.

Q. Why does it mean Golden Glow? [59]

A. We have orders come into our plant for so many cases of "Glow".

Q. Have you some of those orders with you?

A. No, I have not. I have been in places where people called for a bottle of "Glow".

Q. When did you first use this label on the bottle cap with the word "Glow" as shown by Exhibits 9 and 11, and 14?

A. The first one was put out in 1925—1927.

Q. That is plaintiff's Exhibit 11. When was that put out? [60]

A. That label was put out in 1927.

Q. In 1927?

A. Yes.

(Testimony of George J. White.)

Q. This entire style of package was put out in 1927?

A. Let me see it once more. This is beer. This came out in 1933.

Q. This Plaintiff's Exhibit 11 did not come out until 1933, is that correct?

A. That type of label.

Q. What month in 1933?

A. April.

Q. That was the first time that you used a bottle of beer with this word "Glow" disassociated with the word "Golden" or "It's the After Glow"?

A. Let me see that label. You have got so many labels there—this came out after beer was recognized, old Lager; that green label came out in 1933 when beer was recognized, that one, there.

Q. Now, you are talking about Plaintiff's Exhibit 9?

A. Whatever it is. That label was put out in 1933.

Mr. Graham: When did No. 11 come out, the one you have in your hand?

A. This came out in about 1936.

Q. And No. 9 to '33?

A. Yes.

Q. When did you first use the word "Glow" on this metal bottle cap?

A. In 1935.

Q. In 1935?

A. Yes.

(Testimony of George J. White.)

Q. Are you certain of that?

A. Yes. I am certain of that.

Q. How could this Exhibit 9 have been packed in 1933 if you first used that word "Glow" on the bottle cap in 1935.

A. That is a sample bottle.

Q. This is a sample bottle?

A. Yes. We continued to pack beer in that until 1936.

Q. You continued to pack beer until 1936 in the green label as [61] shown by Exhibit 9?

A. Yes.

Q. In 1933 did you put out a beer similar to this label of Exhibit 9?

A. Yes, in 1933.

Q. Did it have "Glow" on the cap in 1933?

A. No.

Q. When was the word "Glow" on the cap adopted?

A. In 1935.

Mr. Hackley: What do you mean by that, "Glow" alone?

Mr. Graham: I am talking about "Glow" alone.

A. The cap or the label—Are you talking about the cap or the label?

Q. I am talking about the cap on the bottle of Exhibit 9.

A. That came out in 1935.

Q. That is, the word "Glow" alone?

A. Yes, on the cap.

(Testimony of George J. White.)

Q. And prior to 1935 you used "Golden Glow" on the cap?

A. Yes.

Q. Referring to Exhibit 10, when did you first put this out?

A. It came out in 1934.

Q. Now, is that the type of label on which you had 12½ per cent.

A. Yes, that was the label.

Q. Did you ever put up a 12½ per cent ale?

A. It was ale 12½ per cent. That is the label 12½ per cent.

Q. The label had 12½ per cent on it?

A. Yes.

Q. In pretty large figures, was it not?

A. Well, fairly good size; it came as a medallion on the label.

Q. It was in that box?

A. It was right in here where it is now.

Q. Where the label at the present time says "Old Ale" you had 12½ in letters of that size?

A. Yes.

Q. Why did you take it off?

A. We were compelled to take it off.

Q. Who compelled you to take it off?

A. The authorities.

The Court: We are not here on a violation of liquor laws, we are not concerned with that. It is remote from any issue in this case. [62]

(Testimony of George J. White.)

Mr. Graham: We may be concerned, if your Honor please, with the matter of deception the label (sic), affecting the use of the trademark.

The Court: As to illegal contents?

Mr. Graham: Yes.

The Court: That is too remote.

Mr. Graham: For the purpose of the record may I continue with just one or two questions about one of the other labels along the same line?

The Court: Yes.

Mr. Graham: Referring to Plaintiff's Exhibit 7, with the 5 per cent. in the center box of the label, was that eliminated for the same reason, it was objectionable on the part of the Government?

A. Yes.

Q. Did you ever put out any label at any time other than the cap on these bottles with the word "Glow" alone?

A. You refer to the label or cap?

Q. I am talking about the label, the paper label. Did you ever put out a paper label on the bottle containing the word "Glow" alone, not associated with other legends?

A. We had "Golden Glow"—before that label was Golden Glow, we had them in black type, the same as that.

Q. I am talking about the word "Glow" alone. Did you ever use that on a paper label by itself?

A. No.

(Testimony of George J. White.)

Q. In any association with the word "Golden" or with the phrase "It's the After Glow"?

A. We had the Golden Glow in black letters, and we changed it, and had the "Glow" below the "Golden".

Q. Let me put the question in this way: When using that word [63] alone, without association with other legends, you have used that exclusively on the cap of the bottle?

A. Yes.

Q. And on the sign on your building that you have referred to?

A. Yes.

Q. And not on paper labels that go on the bottle?

A. It was always "Golden Glow."

Q. That is, on paper labels?

A. Yes.

Mr. Graham: That is all.

Redirect Examination.

Witness is shown a copy of Exhibit 5, a registration of trade-mark "Glow" for October 24, 1933, and reads:

PLAINTIFF'S EXHIBIT 5

"To the Commissioner of Patents: [64]

"Golden West Brewing Co., a Corporation duly organized under the laws of the State of California, located at Oakland, California, and doing business at 535 Kirkham Street, Oakland, California, has adopted and used the trade-

(Testimony of George J. White.)

mark shown in the accompanying drawing, for malt beverages with not more than the legal alcoholic content, in Class 48, Malt Beverages and Liquors, and presents herewith five specimens showing the trade-mark as actually used by applicant upon the goods and requests that the same be registered in the United States Patent Office in accordance with the Act of February 20, 1905. The trade-mark has been continuously used and applied to said goods in applicant's business since on or about July 1, 1925. The trade-mark is applied or affixed to the goods by being imprinted on the cap to the bottle, or other containers, or is shown on a printed label attached to the goods, or in any other suitable manner.

“Application is the owner of registrations Nos. 231,843, August 30, 1927; 232,983, September 20, 1927; 298,088 October 11, 1932.”

That trade-mark is “Glow”. [65]

Witness is shown a part of certified file wrapper of the registration from which he has just been reading, and was asked if he recognized the signature “George J. White” appearing on both of those documents?

A. Yes, that is my signature. As a part of that document appears a photostatic reproduction of the bottle caps. This shows the original crown of the bottle cap. These were those crowns of bottle caps

(Testimony of George J. White.)

in use on bottles when this application for registration was made on May 17, 1933, when our application for registration was made. The date under my signature, May 13, 1933, determines the time.

As Plaintiff's Exhibit 23, a certified copy of file wrapper and contents of trade-mark No. 307,486, covering the registration of the word "Glow" alone, dated October 24, 1933, was received and marked "Plaintiff's Exhibit 23".

The registration of "Glow", which I have just read into the record, shows the true and correct facts.

Cross-Examination

Mr. Graham: Q. I notice in this registration certificate, Plaintiff's Exhibit No. 5, you state that the trade-mark has been continuously used and applied to said goods in applicant's business since on or about July 1, 1925.

A. Golden Glow. The Glow——

Q. That is this trade-mark here shown on this certificate, Exhibit No. 5. [66]

A. That was used in conjunction with Golden Glow since that date.

Q. Never used by itself, without its conjunction with some other matter, like "Golden" in Golden Glow, or in the phrase, "It's the after glow", prior to 1933?

A. That is the label of the—— "Golden Glow" has been used since 1925. The "Glow" in conjunction with "Golden Glow".

(Testimony of George J. White.)

Mr. Graham: But only in conjunction with "Golden Glow" and as a part of that combination?

A. And the "After Glow".

Q. And the "After Glow"?

A. Yes.

Q. Never used by itself prior to 1933?

A. Not by itself, no.

Q. At what time in 1933 did you first begin to use the word "Glow"?

A. In April, 1933.

Q. Have you any orders to show when you began using the word "Glow" by itself?

A. We have records in our books.

Q. Is this Exhibit No. 9 the first one on which you put this bottle cap containing the word "Glow" unaccompanied by other data—other legends?

A. 1933.

Mr. Hackley: (continuing) We offer an objection to this question. It is absolutely a matter of law. The word "Golden" has been used sometimes in connection with "Glow" and sometimes the word "Glow" has been used alone. The word "Golden" is an adjectival phrase to the word "Glow", and we can spend an indefinite time on this subject. We are suing on our trademark. It is here and we have used extensively, as the records will show.

Mr. Graham: It is the mere recording of a right acquired at common law and therefore we have the right to establish [67] what that was.

(Testimony of George J. White.)

Mr. Hackley: The witness has testified he used the mark from 1933.

Mr. Graham: He testified 1935, and then he shows in his certificate of registration, Exhibit 5, that he used it since 1925.

Mr. Hackley: The word "Glow" has been part of "Golden Glow" and the predominant feature of the mark.

Mr. Graham: We are talking of the registration where he shows the word "Glow" alone.

The Court: Q. Did you ever use the word "Glow" alone at any time on the label or cap?

A. On the cap, I think. Not the label. "Golden Glow" was never used alone on the label, but on the cap.

Q. When was the first time you used it on the cap?

A. 1933.

Mr. Graham: Q. In what month of 1933?

A. April, when beer came back.

The Witness: We had to have the cap first before we registered the cap. We used them before we registered them.

By stipulation and as shown by Exhibit 24, the following summary from Plaintiff's records was offered and received: [68]

(Testimony of George J. White.)

PLAINTIFF'S EXHIBIT 24

Sales of "Golden Glow" Beer

		<u>Gross Sales</u>	<u>Gallons</u>
1925	Near Beer	\$ 137,377.40	300,168
1926	“ “	278,035.88	609,683
1927	“ “	307,793.78	673,215
1928	“ “	374,831.89	822,296
1929	“ “	432,407.38	921,211
1930	“ “	384,357.60	842,580
1931	“ “	349,966.90	717,991
1932	“ “	253,527.20	473,153
1933 Inc'l Apr. 6th	“ “	35,397.34	70,804
		<hr/> 2,553,695.37	<hr/> 5,431,101
1933 Apr. 7th and following—			
	Beer	1,988,034.48	3,372,072
1934	“	2,248,861.70	3,784,275
1935	“	1,989,102.33	3,521,589
1936	“	2,032,488.21	3,622,612
1937	“	2,008,404.61	3,521,360
		<hr/> \$10,266,891.33	<hr/> 17,821,908
		<hr/> <hr/>	<hr/> <hr/>
	Recapitulation		
	Near Beer	\$ 2,553,695.37	5,431,101
	Beer	10,266,891.33	17,821,908
		<hr/> \$12,820,586.70	<hr/> 23,253,009).
		<hr/> <hr/>	<hr/> <hr/>

Mr. Graham: Calling attention to the fact in 1925 from that date until 1933, it was near beer, and from 1933 to 1937, the sales are of beer.

Mr. Hackley: Yes, the legal requirement in those [69] periods, and the chart so shows.

(Testimony of George J. White.)

Likewise a table of advertising expense for Golden Glow Beer from 1925 to 1937, being advertising expenses directly applicable to Golden Glow Beer and not the other brands of beer, was received as Exhibit 25 and is as follows: [70]

(Testimony of George J. White.)

PLAINTIFF'S EXHIBIT 25

Advertising Expense for Golden Glow Beer

	Point of Sales Hangers etc.	Newspapers Catalogues and Programs	Bill Boards	Painted Signs	Electric Signs	Radios	Movies	Miscel.	Street Cars	Total
1925								3 891 00		3 891 00
1926								4 226 18		4 226 18
1927								5 086 39		5 086 39
1928								7 631 37		7 631 37
1929								22 396 08		22 396 08
1930								23 269 81		23 269 81
1931	2 104 75	3 156 67		20 935 95				1 034 70		27 232 07
1932	6 532 73	1 454 08	3 651 63	3 673 77		785 40	383 25	11 561 13		28 041 99
1933	13 635 71	9 519 59	5 939 65	13 704 83	1 949 50	91 91		5 956 89		50 798 08
1934	25 450 15	27 373 56	1 709 06	29 765 23	5 628 97	2 956 96	109 93	38 878 07		131 871 93
1935	40 370 60	26 200 14	5 437 62	7 682 63	16 717 99	7 223 18	820 58	16 025 11	7 058 29	127 536 14
1936	20 670 97	17 820 87	12 930 30	12 679 01	22 789 22	12 284 80	1 169 71	11 811 01	7 037 46	119 193 35
1937	13 545 52	4 196 01	20 437 08	10 511 10	22 832 50	837 81	277 44	7 530 97	1 303 83	81 472 26
	<u>122 310 43</u>	<u>89 720 92</u>	<u>50 105 34</u>	<u>98 952 52</u>	<u>69 918 18</u>	<u>24 180 06</u>	<u>2 760 91</u>	<u>159 318 71</u>	<u>15 399 58</u>	<u>632 666 65</u>

LARRY LAVERS

called as a witness on behalf of plaintiff and testified as follows:

Direct Examination.

My name is Larry Lavers. I reside at 618 Excelsior Boulevard, Oakland; and am Oakland District Manager for the Golden West Brewery. I have been with the Golden West Brewery approximately five years. At one time I was San Francisco District Manager for the Golden West Brewery.

Mr. Hackley: Q. Do you recall any instance in which you were called upon to purchase any Alpen Glow beer while you were in the San Francisco office?

A. I do.

Q. Would you recognize a purchase tag for Alpen Glow beer? I hand it to you and ask you if you can identify it.

A. Yes, sir. This is a tag given me by an employee, or similar to a tag given me by an employee of the General Enterprise Distributing Works about two or a little over two years ago. This apparently is the tag I obtained.

Witness: The circumstances were as follows: I went to the office of the General Enterprise Company and was waited on by a young lady behind a counter. I asked her for a case of Glow beer. She brought out a second-hand carton, as I recall it, of some other brand, and I asked her for Glow beer, so she said, "This is Glow", and "I just filled the

(Testimony of Larry Lavers.)

carton". I looked at the carton and it was Alpen Glow. I said, "I asked for Golden Glow." "No", she said, "this is Alpen Glow". This is the carton I purchased at the time of this event. The date of the purchase of this carton of beer is fixed by the sales slip which I presented here. The sales tag reads: "General Enterprise Company, Milonas & Sons, Inc., Distributors Alpen Glow Beer." Date, December 16, 1935; cash; address, blank; one— [72] abbreviation for "carton". Capital "A". Glow. Pt. Two Fifteen. Below that, "Alpen Glow Beer", and below that, "Paid. D." It is a little indistinct; I would say "D. N. G." or "D. M. C." I can't read that. Somebody's initials on the bottom.

Mr. Hackley: Q. Do you recall anything about how that tag happened to be made out with reference, first to one carton A. Glow pint, and then down below, "Alpen Glow Beer"?

A. Yes. When she gave me the tag, as she was writing the tag I could not see what she had written in there, and I mentioned to her, I said, "What is the price of some of your other beer?" She gave me prices on two or three other brands, and I stated, "Well, I am interested in prices on various brands. Be sure to mark on this tag what this brand of beer is," and then she wrote below there the second "Alpen Glow beer."

Q. The tag as originally made out referred to one carton of A. Glow?

A. Yes, sir.

(Testimony of Larry Lavers.)

Q. Later, at your request, she wrote "Alpen Glow beer" on it?

A. That's right. At the bottom.

The sales tag just identified by the witness, the invoice head of General Enterprise Company, Milonas & Sons, is marked as Plaintiff's Exhibit 26.

Q. This General Enterprise Company, Milonas & Sons, Inc., refers to the defendants in this case?

A. Yes, sir.

The carton containing a full case of Alpen Glow beer identified by the witness is received in evidence as Plaintiff's Exhibit 27.

Mr. Graham: We will stipulate that is the defendant's beer.

Mr. Hackley: Q. Mr. Lavers, did you have any other experiences with the General Enterprise Company, Milonas & [73] Sons, Inc., and their product, Alpen Glow beer, while you were in the San Francisco office?

A. Yes, plenty.

Q. What were some of those experiences?

A. Well, almost daily; at that particular time was when the N.R.A. first began to function—all beer firms were required to post prices [74] and maintain those prices, and almost daily I got complaints that Golden Glow was breaking down on their prices or selling below prices——

The Court: Is that what they called "chisellers"?

A. Yes. I would say that an average of once a day, and sometimes oftener, I was called upon to go

(Testimony of Larry Lavers.)

to some particular part of town to run down a report that Golden Glow was being sold for various prices—always below the established price, and without exception when I got there I found that it was Alpen Glow and not Golden Glow. I found frequently signs in windows with the word “Alpen” very, very small. I mean hand-painted signs, usually with a brush of some kind—the word “Glow” very large, an eight inch letter, with the word “Alpen” possibly an inch letter, the price it was, for twenty-five, or whatever it happened to be, “special.”

In calling on the trade I did personally frequently—was confronted with the charge that my price was too high, that he could buy Glow elsewhere at twenty to forty or fifty cents less, and always found when you would run it down it was Alpen Glow and not Golden Glow.

Mr. Hackley: Q. Approximately what period of time are you referring to, Mr. Lavers?

A. Well, I would say that starting from about, oh, the first of—all through 1935 and into the start of 1936. It is more or less a guess, but along that period, or even, probably, some in 1934. Quite a bit in 1934.

Q. What were the comparative prices of the two products from the wholesale standpoint at that time—Golden Glow and the Alpen Glow?

A. I am not able to say what the price of Alpen

(Testimony of Larry Lavers.)

Glow was, except it was in a lower structure than ours. [75] Thirty or forty cents less.

Q. Thirty or forty cents less on what unit? Per case?

A. Per case.

Witness: Another experience occurred when a fellow had a sign in the window, a big 12 or 6 inch letter "Glow" and "Alpen" in very small letters at the top, and I tried to make him take the sign down, and he wouldn't do it, so I got around close to the sign and pulled it down. I thought I would get away with that without him seeing me, but he happened to see me and we had quite a rumpus about it. This was at about Thirtieth and Mission or Thirty-first and Mission, in a very small spot, but a fellow that sold a lot of beer, on the north-west corner—about two doors from the corner.

Cross-Examination.

Mr. Graham: Q. When you went into the plant of the Golden West Company, what was your position?

A. District Manager for San Francisco.

Q. In what year did you go to work for them?

A. 1933.

Q. Then you worked for them for how long—for how many years before you went to the main plant in Oakland?

A. I went to the main plant in 1936, about March.

(Testimony of Larry Lavers.)

Q. When you purchased this beer, which is Exhibit 27, you asked for Glow beer? You did not ask for Alpen Glow beer?

A. No, sir.

Q. You knew what you were getting:

A. I went there for that purpose yes, to buy that beer.

Q. And the party specifically told you that it was Alpen Glow Beer, and not Golden Glow?

A. Not until I asked later.

Q. You asked for Golden Glow and she told you, "This is Alpen Glow"?

A. That was after I got the beer. [76]

Q. After you got your beer you asked about Golden Glow?

A. I was watching—trying to watch through the window, or over the front from where she was standing at, and seeing her write the tag it did not look to me as if she had made any mention of what kind. It looked like "one case". Naturally, in looking for evidence, to have the tag identified I brought up that point, and then she wrote again below, which I saw after I got the tag in my possession. She had "Alpen Glow" on there twice, although I didn't think it was on there at the start.

Q. Have you any of those signs you referred to as being "Alpen Glow" in small letters, a portion in small and a portion in large letters?

A. No.

Q. You never collected any of those signs?

(Testimony of Larry Lavers.)

A. I had one for a while.

Q. What did you do with it?

A. I didn't make any attempt to save it.

Q. When did you pick that up?

A. That is the one I just mentioned a while ago.

Q. What date did you pick that up?

A. I couldn't say.

Q. Couldn't you say what year it was?

A. Well, it would be just guessing, the latter part of '34, or somewhere in '35. Something like that.

Q. Was it before you made this purchase of——

A. Quite a while back.

Q. —of Exhibit 27?

A. I am pretty sure it was, yes.

Q. When you got that sign you knew there were some complaints about this beer of Milonas & Sons?

A. I don't understand you.

Q. When you picked up this sign at this store that you speak of you knew there was some complaint from your company about the [77] use of "Alpen Glow" by Milonas & Sons?

A. At that time I did not know that there was any suit contemplated, in fact, I didn't think there was any suit contemplated at that particular time.

Q. How long had you known about Alpen Glow beer being on the market?

A. Well, I can't say, but practically from the time beer became legalized—alcoholic beer.

(Testimony of Larry Lavers.)

Q. Had you become acquainted with the fact it was on the market?

A. We happened to run into it, particularly on the price end of it every time you went in a store. You would run into that end of it.

Q. Was it a matter of any conversation at the plant as to this Alpen Glow beer?

A. Well, I don't recall that, because I wasn't at the plant very often. My headquarters were in San Francisco.

Q. Can you state what part of 1933, if it was 1933, you first became informed that Alpen Glow beer was being sold?

A. I couldn't say at all in 1933. I don't remember that. Probably a little later.

Q. Never heard of it in 1933 at all?

A. I couldn't say whether I did or not.

Q. Could you say about 1934?

A. Yes.

Q. What part of 1934?

A. Well, that would be indefinite. I would have to guess at that. Somewhere along in there.

Q. You wouldn't know whether it was the first or last part of the year?

A. No, I couldn't say.

Q. Are you sure it was 1934?

A. I am not even sure of that.

Q. Could it have been 1935?

A. It could have been one of the two, yes, or probably both of them. [78]

(Testimony of Larry Lavers.)

Q. How many of those signs did you see with the words "Alpen Glow" on them, with the word "Alpen" in small letters and the word "Glow" in large letters?

A. I recall one at the Cosmos Market, which was on either Pine or Bush Street, about Hyde or Leavenworth, which the proprietor took down at my request, and I would say probably two or three other places. Maybe more than that.

Q. What type of sign was that?

A. Well, as I recall it, it was a piece of wrapping paper, or piece of similar paper, with a long—a marking pot brush, which is written by the proprietor or one of his clerks.

Q. Had you had complaints about the use of those signs?

A. Yes.

Q. You never saved any of them at all?

A. No, I didn't, because at that time I did not know we were figuring on any court action.

Q. You were fully cognizant or had full information of the fact that you had some complaint against those signs or else you wouldn't have them taken out?

A. That's true, yes.

Q. You never saw any regular printed or lithographed signs of Milonas & Sons or the General Enterprise Company for the Alpen Glow beer, did you?

A. I don't recall ever having seen one, no, sir.

(Testimony of Larry Lavers.)

Redirect Examination

The Witness: I am acquainted pretty generally with the degree of distribution of the defendant's product, Alpen Glow, in the territory in which I have been working. It has been very prominent in the Mission District, in the Eureka Valley District, and in some of the so-called Greek grocery [79] stores up in the downtown apartment house district. I ran into Alpen Glow in competition every day. [80]

WILLIAM A. REMENSPERGER,

called as a witness on behalf of plaintiff and testified as follows:

Direct Examination

My name is William A. Remensperger; 60; residence, San Francisco, 990 Monterey Street. I am a stockholder and director of Golden West Brewing Company, and I have been a director of the company since the latter part of 1933.

I am also president of the Enterprise Brewing Company which was incorporated by my father and his partners in 1893, and until Prohibition went into effect, I believe we carried on until the final date of 1919, and thereafter we made a connection with another brewery and carried on our trade name, "El Capitan" and the like, through another brewery, which was filling our products at the time

(Testimony of William A. Remensperger.)
under near beer.

We continued the sale of near beer up to the time it went—it opened up again in April, 1933. At that time we connected with the Golden West Brewing Company.

We simply purchased beer under the—with the idea of continuing our brand, “El Capitan beer”, since which time we interested ourselves in the purchase of the stock and becoming members and directors and carried on distribution with the Golden West Brewing Company in San Francisco.

We negotiated with the Golden West Brewing Company, I believe it was in 1933, or the latter part of 1933, and consummated a transfer of the brands covering all our copyrighted trademarks, good will—to the Golden West Brewing Company, for a price.

Our beers are now being manufactured by Golden West and are being labeled under our brands. We sold the brands [81] out to Golden West with the goodwill of the business.

Mr. Hackley: Q. Has the Enterprise Brewing Company, the defendant, any right to use the name “Enterprise” in its [82] company name?

A. No, sir.

Witness: I had a little experience after luncheon today, regarding “Glow” beers. We were proceeding along Taylor Street to the court rooms,—Mr. Goerl and myself, Attorney Hackley, and Attorney Townsend were proceeding along Taylor Street, and in a window observed the display of the dif-

(Testimony of William A. Remensperger.)

ferent brands in cans and bottles, among which was quite a display of Alpen Glow as well as Golden Glow, and the thought entered that we would endeavor to purchase a few bottles by asking for Glow, and we approached the storekeeper and asked him if he would wrap up two bottles of Glow. He wanted to know what kind of Glow, Golden Glow or Alpen Glow, and we asked him what he thought was the best, and he stated they were practically all alike, and we told him to fill our requirements in Alpen Glow, for which we paid. This was the Daldas Grocery Store, number 199 Eddy Street.

Mr. Graham: No cross examination.

MAX IDOL,

called as a witness on behalf of plaintiff and testified as follows:

Direct Examination

My name is Max Idol; residence, 837 Geary, apartment 307. I am employed as a salesman for Golden West Brewing Company, and have been since the latter part of June or July, 1935. I was a driver for over two years, and I have been salesman since last fall.

Recently, I went into a grocery, the Daldas Grocery Store, at the corner of Eddy and Taylor Streets. I asked for a couple of bottles of Glow, and he said "Golden Glow or Alpen Glow?" I told

(Testimony of Max Idol.)

him either Glow. So he looked in one showcase. [83] It wasn't there, so he went to another showcase, and I told him one bottle would be enough. He wrapped the bottle up and he gave me Alpen Glow.

I saw a display of beers in that store. I saw a stack of Alpen Glow ale, and a stack approximately that size,—about four feet high—of Golden Glow. This was cans, however. Golden Glow cans. A stack of Acme cans. I saw them all at the same time, as they were intermingled there in the window—arranged together.

Q. What was the next experience you had?

A. May I go back?

Q. Yes. If you have anything to say go right ahead.

A. They weren't intermingled as to stacks. The stacks were separate. . . . I paid eleven cents for the beer I bought at the Daldas Store—one bottle.

Q. What is the price at which Golden Glow sells?

A. Well, it depends upon the place. One customer might sell beers for a greater price than another.

Q. Are you familiar with the wholesale prices at which bottled beers sell?

A. I am just familiar with the Golden Glow.

Q. Do you know anything about Alpen Glow prices?

A. No, I don't.

(Testimony of Max Idol.)

Q. What price per case does Golden Glow sell at?

A. Single case lots, one eighty.

Q. What sized containers?

A. Eleven ounce bottle.

Q. That is the same size bottle as you bought of Alpen Glow?

A. Yes.

Q. How many bottles to a case?

A. Twenty-four.

Q. Twenty-four?

A. That is exclusive of container. Alpen Glow was sold to me for the same price as the normal price of the Golden Glow. [84]

Another time I went down to Calpello Wine Company. I think that's 307 Fourth Street.

Q. Is that 307 or 207, do you remember?

A. 207 or 307. I asked for a bottle of Glow and he didn't ask me anything else. He just got me a bottle of Alpen Glow and set it on the counter. I asked him to wrap it up, and he charged me ten cents for it—an eleven ounce bottle.

Another instance was up at the Uptown Market, 1758 Fillmore Street. I asked for a couple of bottles of Glow Beer, and he took me back to the ice box and said, "I am sorry, I have no Golden Glow beer. I have ale. But I have Alpen Glow." These three instances occurred yesterday.

Q. Did you have any other similar experience?

A. No, not where there was Alpen Glow in stores.

(Testimony of Max Idol.)

The Court: Did you have any other similar experiences?

A. No, not where there was Alpen Glow in stores.

Mr. Graham: No cross-examination.

JAMES W. HAWK,

called as a witness on behalf of plaintiff, and testified as follows:

My name is James W. Hawk; 48; 99 Fairview Avenue, Piedmont, and I am General Sales Manager for Golden West Brewery. We are required by law to post our prices with the State Board of Equalization. The retailers are required to maintain a price in dealing with the trade.

With reference to the list of posted prices of Alpen Glow and Golden Glow Beer, Exhibit 28, it was stipulated that the witness got those from the official records of the State Board of Equalization.

[85]

Mr. Hackley: Q. I note from the tabulation you have made here, Mr. Hawk, there is a general differential of thirty to forty cents between Golden Glow and Alpen Glow beers on the market. Is that correct?

A. That is the differential—the price per case.

Q. With the Golden Glow beer carrying a higher price?

A. That is right.

(Testimony of James W. Hawk.)

PLAINTIFF'S EXHIBIT 28

is in the words and figures following, to-wit:

3/23/38

San Francisco and Alameda Counties

Golden Glow Beer

Alpen Glow

Wholesale

\$1.40	24/11-oz	\$1.10
1.30	12/22-oz	1.10
1.40	24/11-oz chains	1.20
1.30	12/22-oz chains	1.20
1.75	24/12-oz cans	1.55
1.75	24/12-oz cans chains	1.60

Golden Glow Beer

Alpen Glow

Retail

24/11-oz.	1 - 4	\$1.80	1 - 5	\$1.40
	5 - 9	1.75	6 - 24	1.30
	10 - 24	1.70	25 - 99	1.25
	25 - up	1.65	100 - 249	1.20
			250 - up	1.10

[86]

Golden Glow Beer

Alpen Glow

Retail (Continued)

12/22-oz	1 - 4	\$1.70	1 - 5	\$1.40
	5 - 9	1.65	6 - 24	1.30
	10 - 24	1.60	25 - 99	1.25
	25 - up	1.55	100-249	1.20
			250 - up	1.10
24/12-oz cans	1 - 4	2.10	1 - 4	1.80
	5 - 9	2.05	5 - 9	1.75
	10 - 24	2.00	10 - 249	1.70
	25 - up	1.95	250 - up	1.60).

The Witness: The relative differential in price between Alpen Glow and Golden Glow beers over the past few years, has been from thirty to forty cents. This table is representative of the prices for that period of time.

JOHN W. HAFNER

called as a witness on behalf of plaintiff and testified as follows:

My name is John William Hafner. I am eighty-one, and live at Newark, Alameda County. I go to Palo Alto very frequently, about twice a month, and I go in there on the bus, on the stage, and I generally take my lunch there at noontime. I go into a little lunch place and the girl waited on me and I asked for a can of Glow, and she brought my lunch and the beer. I saw it was a different beer than I had been drinking. I never thought of asking for Golden Glow. I did not know there was any other Glow but Golden Glow. So she brought the can. It was opened and I had to drink it.

Mr. Hackley: What was it?

A. It wasn't such a good beer.

Q. What was the name of the beer?

A. Alpen Glow.

Q. Have you ever had any Golden Glow to drink?

A. Oh, yes. [87]

Q. How did the Alpen Glow beer compare with Golden Glow beer, from the standpoint of your taste?

A. I did not like it.

Q. You asked for Glow and they brought Alpen Glow:

A. Yes. I never knew there was any Glow except Golden Glow when I asked for it.

(Testimony of John W. Hafner.)

Cross Examination

Mr. Graham: Q. What was the address of this place?

A. The address is Newark, Alameda County.

Q. That is your address?

A. Yes, sir.

Q. What is the address of this place in Palo Alto where you got this beer?

A. I could not give you that, but it was on a main street. I could go to it any time. It was a little lunch. A permanent affair.

Q. What is the name of the place?

A. I don't think there is a name on it, but the man gave me the name, but I can't think of it. I gave the name to——

Q. Do you go there often?

A. I go there about once a week or once a month or maybe twice a month.

Q. When was this that you went there and got the beer that you asked for as Glow beer?

A. That was—it was along last summer, some time there, May or June, I think.

Q. You have been there since?

A. Yes.

Q. Have you asked for beer?

A. I ask for Golden Glow beer now.

Q. You ask for Golden Glow beer?

A. Yes, sir.

Q. When you ask for Golden Glow you always get Golden Glow?

A. Yes.

(Testimony of John W. Hafner.)

Q. Have you ever asked for Alpen Glow?

A. No, I never did.

Q. This is the only time you ever asked for Glow, to your [88] knowledge, at this place?

A. Oh, well, I asked—I have been going there about seven years, and I think I always asked for Glow when I went there, and I never—just Glow. I asked for Glow . . . I was in the hotel business until it went dry in 1920, and then I quit.

Mr. Graham: Q. Since this time that you testified to when you asked for Glow and were given Alpen Glow—

A. (Interrupting) Yes.

Q. (Continuing) —You know there is an Alpen Glow beer on the market?

A. No, I didn't.

Q. You know it now?

A. Yes.

Q. When did you find out there was an Alpen Glow beer on the market?

A. Why, when I got that.

Q. And you have known it ever since, there was Alpen Glow on the market?

A. Yes. I have often saw it on the counters and in windows.

Q. Since then you have noticed it?

A. You can't get anything stronger in Palo Alto than beer.

Q. Since that time you have always particularly mentioned the kind of beer that you wanted? You have asked for Golden Glow?

(Testimony of John W. Hafner.)

A. Yes.

Q. And now you know there is a Golden Glow on the market and there is an Alpen Glow on the market do you recognize the difference between those names?

A. Oh, yes; yes, sir.

Q. They are sufficiently different that you know which particular beer you want?

A. That's it. [89]

Redirect Examination

Mr. Hackley: Q. Mr. Hafner, did you write a postal card to Mr. White, president of the Golden West Brewing Company, telling him of your experience in Palo Alto?

A. Yes, I did.

Q. Will you examine this card and see if you recognize it.

(Handing paper)

A. Oh, yes. Popular Sandwich Shop. That is the name of the place. 319 University Avenue.

Q. How long have you known Mr. White?

A. Well, I have known Mr. White——oh——when I was in the hotel business.

Q. Were you employed by the Golden West Brewing Company to go down to Palo Alto and get this evidence?

A. No, I wasn't.

Q. You were just an aggrieved customer that got the wrong beer?

(Testimony of John W. Hafner.)

A. I was on my way to Los Angeles when I wrote that. I went over there to catch the night train. It is handier there than Oakland or San Francisco.

Plaintiff Rests

Defendant's Exhibit "A" is a stipulation that either party may use printed copies of certificate of registration in the Patent Office.

Defendant's Exhibit "B" is a registration in the United States Patent Office to Milonas & Sons, doing business as General Enterprise Co., San Francisco, the trademark "Alpen Glow", class 48, registered June 18, 1935, on application filed May 12, 1933, certificate being numbered 325,342.

Mr. Graham: I also offer in evidence as Defendant's Exhibit C trademark registration number 309,792, registered January 30, 1934, to Philadelphia Brewing Company, of Philadelphia, Pennsylvania, with the trademark "Brown Glow". [90]

Mr. Hackley: This is not set up in your Answer.

Mr. Graham: It does not have to be. There is no proviso in the trademark statutes that you have to.

Mr. Hackley: You haven't claimed anywhere in your answer this trademark has been anticipated, have you?

Mr. Graham: Claimed the trademark is invalid and it is not infringed. We have a right to take

advantage of any matter to apply to the construction of the trademark.

The Court: May I call this to your attention? I may be in error. This is from the Eastern seaboard. The territory covered here is the Western States. Will you indicate for the purpose of the record the purpose of the offer?

Mr. Graham: To show, your Honor, that the Patent Office has not given any particular significance to the registration of the word "Glow" by the plaintiff here, that it registers "Alpen Glow" to the defendant, registers "Brown Glow" for beer to another party.

The Court: Very well. I will allow it.

Mr. Hackley: This has not yet been offered. I want to make a formal objection. Have you offered it yet?

Mr. Graham: I will offer it as Defendant's Exhibit C, being the registration certificate for Brown Glow, number 309,792, registered January 30, 1934, on an application filed September 28, 1933, for beer in Class 48.

Mr. Townsend: This appears to be a registration on which there is no proof of use of a third party. It is a registration subsequent to the plaintiff's registrations and proven use. It has been pretty generally recognized—there is some difference of opinion in different courts about allowing registrations to third parties—the weight of authority is against [91] the pertinence of such admissions of registrations. On the same basis that, whatever may

have been done by other parties, does not excuse the defendant from his trespass and wrongdoing, and so we object as improper for all purposes.

The Court: So that counsel may have the record on it, I think I will allow it in subject to a motion to strike over your objection, so that I can examine those authorities. In answer I should say that would go to the weight of this rather than its admissibility.

Mr. Graham: I would agree with your Honor.

The Court: I am not clear on it, but as long as you have raised the objection, it wouldn't go to the admissibility—it would go to the weight of the testimony, would it not?

Mr. Townsend: If it is looked at as not admissible and improper, then it would go to its admissibility. If it is a question of its admissibility, then it would go to the weight. In any event, my objection is overruled, and we note an exception.

The Court: Very well. I will allow it subject to a motion to strike. If I find I am in error I will so indicate.

Mr. Townsend: We felt it proper to call your attention to such a situation so that you might not be misled by the appearance of any number of prior registrations.

Mr. Graham: I make this offer not to show this party used this mark prior to his claim——

The Court: I asked him to indicate for the record the purpose of the offer and he has indicated it is offered for a limited purpose.

Mr. Townsend: In that case I would say it is entirely incompetent, irrelevant and immaterial.

[92]

The Court: Very well. Let the record stand. It is going in subject to a motion to strike over the objection.

(The document referred to was marked Defendant's Exhibit C.)

Mr. Graham: I also offer as Defendant's Exhibit D certificate of trademark registration number 117,-241, registered June 26, 1915, of the trademark "Golden Glow", for ginger ale as a non-alcoholic beverage, for the same purposes.

Mr. Hackley: Same objection.

The Court: Same ruling.

Mr. Hackley: Exception.

The Court: Note an exception on each ruling.

(The document referred to was marked Defendant's Exhibit D.)

Mr. Graham: I offer in evidence as Defendant's Exhibit E trademark 189,437, dated September 16, 1924, for Golden Glow, for baker's sirup of a malt-cereal nature.

Mr. Hackley: Same objection.

The Court: Same ruling.

Mr. Hackley: May we note an exception, your Honor.

The Court: If we are going out of the competitive field of beer, I want counsel to have a record on it.

Mr. Hackley: We are assuming the same ruling would be made if we went through our formal objection.

(The document referred to was marked Defendant's Exhibit E.)

Mr. Graham: Also trademark 291,602, registered February 23d, 1932, for Vine-Glo, for grape juice in Class 45, beverages, non-alcoholic.

Mr. Hackley: Same objection, if your Honor please. [93]

The Court: Same ruling.

Mr. Hackley: Exception.

(The document referred to was marked Defendant's Exhibit F.)

Mr. Graham: I also offer as Defendant's Exhibit G trademark registration 262,874, registered October 29, 1929, for Golden Glow syrup, with the picture of a setting sun, for syrup made from corn and malt, in class 46, foods and ingredients of foods.

Mr. Hackley: Same objection, and note we are straying farther and farther afield.

The Court: Same ruling.

Mr. Hackley: Exception, please, your Honor.

(The document referred to was marked Defendant's Exhibit G.)

Mr. Graham: I will use in the course of my argument certain meanings taken from the dictionary of the words "glow", "golden glow", and "after glow", and "Alpen glow". Rather than put the dictionaries in evidence or read them into the record,

and so that the Court could take judicial notice of them, I have simply made a copy of them.

The Court: For convenience?

Mr. Graham: Yes, and Mr. Hackley has been to my office and compared these copies with the documents.

Mr. Hackley: We agree they are correct copies, but we object to the offer as incompetent, irrelevant and immaterial and having no bearing on this case.

The Court: They may or may not. I have never been able to keep up with the dictionary myself. There have been other Judges that have been able to do it, but maybe it won't help me at all.

Mr. Graham: Would the Court prefer to have these offered as one exhibit? If so, I offer them as one exhibit. [94]

Mr. Hackley: Do I understand there was a ruling on my objection, your Honor?

The Court: Yes. The objection will be overruled.

Mr. Hackley: May I note an exception, please?

The Court: Yes.

(The document referred to was marked Defendant's Exhibit H.)

JOHN MILONAS

called as a witness on behalf of defendant and testified as follows:

My name is John Milonas and my address is 1960 Folsom Street. That is the present address of the defendant corporation—Milonas & Sons, Inc., doing business under the name General Enterprise Company. I am General Manager of that corporation, and the corporation is in the beverage business. We have soft drinks, wine, liquors and beers, and we do business under the name of General Enterprise Company, which we adopted in 1933; we figured on handling general merchandise like a drug house. I handle soft drinks, beer, all kinds of beers, and I have the agency for the Schlitz Brewery Company, and also wines and liquor.

The Court: Exclusive agency for the Schlitz?

A. Yes, in the San Francisco area and Oakland.

Mr. Graham: Q. Has the business of Milonas & Sons, Inc., always been operated as a corporation?

A. No. We incorporated since 1934.

Q. Do you know what month?

A. I presume in September. [95]

The name of the company before it was incorporated was General Enterprise Company. Milonas & Sons doing business under General Enterprise Company. It is a partnership of Milonas and his sons. Me and my sons were doing business as the General Enterprise Company. It was a partnership,

(Testimony of John Milonas.)

and the business of the partnership was on the same general line as the business of the present corporation; the business was assigned to the corporation.

Mr. Graham: I offer the assignment in evidence as Defendant's Exhibit next in order.

(The document referred to was marked Defendant's Exhibit I.)

Mr. Graham: Q. Do you have anything to do with the operation of the business of the corporation?

A. Yes, sir. My capacity out there in operating the business is General Manager. I did the same thing for the company before it was a corporation. I started it. I sell Gold State beer of San Francisco, and Willows Lager. I sell Alpen Glow, my own label; Willows Lager, my own label; and Ramona.

Mr. Graham: Q. You sell at this time, beer under the Alpen Glow label?

A. Yes, sir. This is the label that I use today for Alpen Glow Beer. I use today, the Alpen Glow label, identical, without any change.

Mr. Graham: I offer this as Defendant's next in order.

(The document referred to was marked Defendant's Exhibit J.)

Mr. Graham: If the Court please, yesterday we requested Mr. Hackley, attorney for the plaintiff, to bring in some records as to the first use of metal caps containing the word "Glow". [96]

(Testimony of John Milonas.)

The Court: What is the date?

Mr. Hackley: March 18, 1933.

The Court: Is that statement satisfactory?

Mr. Graham: I would like to have it for the record.

The Court: It is stipulated that is the date if there is any question about it.

Direct Examination

of John K. Milonas (continued):

Witness: The "Alpen Glow" label was adopted in 1932, in the month of December.

(The label was marked "Defendant's Exhibit K".)

Mr. Graham: Q. Do you use any other label bearing "Alpen Glow"?

A. Yes. On root beer. I presume we have used that on root beer about around two years.

(The root beer label was marked "Defendant's Exhibit L".) [97]

Mr. Graham: Q. I hand you a label for sparkling water. Did you also use that?

A. Yes.

Q. How long?

A. I presume, the same time.

(The sparkling water label was marked Defendant's Exhibit M".)

Mr. Graham: Are these bottles that I show you—they are Alpen Glow Orange Soda—are they a product of your corporation?

A. Yes.

(Testimony of John Milonas.)

Q. And this specimen of ginger ale?

A. Yes.

Q. They are all your products?

A. Yes.

(The bottles were marked Exhibits "N", "O" and "P" respectively.)

Mr. Graham: Q. Was this carton, I hand you, also used by you for packing beer?

A. Yes.

Q. It contains the name "Alpen Glow" on the side of it?

A. Yes.

(The box was marked "Defendant's Exhibit Q".)

Mr. Graham: Q. I hand you another carton. Is that also used by your corporation?

A. Since 1933.

Q. 1933?

A. About that date. [98]

(The carton was marked "Defendant's Exhibit R".)

Mr. Graham: Q. Do you also put out cans of beer?

A. Yes.

Q. With the "Alpen Glow" label?

A. Yes.

Q. Do these two cans—are they specimens of your canned beer?

A. Yes.

(The first beer can was marked "Defendant's Exhibit S".)

(Testimony of John Milonas.)

(The second beer can was marked "Defendant's Exhibit T".)

Mr. Graham: Q. Is this one of plaintiff's cartons?

A. Yes; their "Golden Glow".

(The carton was marked "Defendant's Exhibit U".)

Mr. Graham: Q. When was your "Alpen Glow" label adopted by you?

A. 1932, the month of December.

Asked how he happened to adopt his Alpen Glow label, witness said:

"We figured out to go into the beverage business, and we go to the label man,—to Mr. Roesch—Louis Roesch; and I asked him what labels he got, and if he can help me to find a label; and he showed me a lot of labels, and he said, 'If you come back tomorrow, I show you some more.' I go to his office the next day, and he finds the 'Alpen Glow'—and he finds it,—the 'Alpen Glow'; and I says, 'Really, I don't like it. What it mean: "Alpen Glow"?' So, he says, 'That is a very, very nice name, Milonas,' and he says, 'You go back to your dictionary and find out what it means: "Alpen Glow".' When I go back home, I find out what it means, and I [99] go back to him and I said, 'I think I like this label; really, I like it.'

The day I went to Mr. Louis Roesch's office, in my presence Mr. Louis Roesch telephoned to Jackson and Webster and gave them the details of what

(Testimony of John Milonas.)

we looked for; and the day after, we received this letter of December 12, 1932, from Jackson and Webster.

(The letter was admitted and marked "Defendant's Exhibit V".)

Mr. Graham: I will read the letter into the record. It is on the letterhead of Jackson & Webster, San Francisco, California, dated December 12, 1932, and addressed to "Louis Roesch Co., 1886 Mission St., San Francisco, Calif." It reads as follows:

DEFENDANT'S EXHIBIT V

"Gentlemen: Confirming our telephonic report this is to advise that 'Alpenglow' is available for Near Beer. Yours very truly, Jackson & Webster."

The Court: Who is Jackson & Webster?

Mr. Graham: Jackson & Webster is a firm that specializes in trademark registrations. That is shown by the letterhead.

Mr. Graham: Q. Did Mr. Roesch show you any labels at the time, to illustrate his ideas?

A. Yes; he showed me a lot of labels.

Q. Is this one he showed you?

A. Yes; "Alpenweiss".

Q. There is a notation here on this label, down at the bottom. Who put that on there?

A. I put it on; they put it out on a piece of paper, and I copied it here,—says "Alpen Glow", leaving out "Alpenweiss".

(Testimony of John Milonas.)

(The "Alpenweiss" label was marked "Defendant's Exhibit W".) [100]

Mr. Graham: Q. Did you order any "Alpen Glow" labels from Louis Roesch and Co.?

A. Yes; he made a proof.

Q. Was it at the time of this conference or shortly afterwards?

A. Well, I think that was a few days; but I presume my recollection would be about 1932, that he made the proof.

Q. Which label was that proof like—to these labels?

A. "Alpen Glow". The proof was the same as Exhibit "K" so far [101] as the picture on the label is concerned. Absolutely. I ordered labels from Louis Roesch & Co. This is a contract made between me and Mr. Louis Roesch, for 100,000 "Alpen Glow" labels. It is dated March 20, 1933.

(The paper was marked "Defendant's Exhibit X".)

Witness: I received delivery of labels from Louis Roesch. All the labels were delivered down to the Milwaukee Brewery or San Francisco Brewery, San Francisco because they pack the "Alpen Glow" for me now, and have packed it continuously for me.

Mr. Graham: Q. I hand you a package of papers. Please state what those are.

A. This is—I have all those sales; and when I make them for "Alpen Glow" beer, since April 7, 1933, up to date. This invoice of April 20, 1933

(Testimony of John Milonas.)

from Louis Roesch, that he delivered 71,500 sets "Alpen Glow" labels to the Golden State Brewing Company, or Milwaukee Brewing Company of San Francisco, and those labels paid by the Brewery. They were delivered to the Brewery that packed my "Alpen Glow" beer.

(The invoice was marked "Defendant's Exhibit Y".)

Mr. Graham: Q. Is this package of orders, that I give you, all of the orders that you ever ordered from Louis Roesch & Co. for labels,—“Alpen Glow” labels? Does it cover all, or a part of them, or what?

A. What do you mean?

Q. Those slips that I am handing you now; do they cover all the orders you have ever given to Louis Roesch for labels? [102]

A. This here, some of my merchandise,—it is not for labels; this here, I sold—I will show you. I sold some deliveries to grocery stores,—“Alpen Glow” beer,—the time beer came in—was legalized. It was after repeal.

It is not all those. It is part of them. Defendant's Exhibit "Y" represents part of the orders for labels that I have given to Louis Roesch & Co.

The Brewery orders labels if they are short of labels. The Brewery orders labels now with my instructions. I have sold "Alpen Glow" beer continuously since I first started. This paper—or this package of sales slips, is representative.

(Testimony of John Milonas.)

(The sales slips were marked "Defendant's Exhibit Z".)

Mr. Graham: Q. Did you ever make an assignment of your trademark "Alpen Glow", and registration No. 325,342 (Exhibit B) from the partnership of Milonas & Sons to Milonas & Sons, Inc.?

A. Yes.

(The assignment was marked "Defendant's Exhibit AA".)

Mr. Graham: Q. Did you ever take up, with anyone of the plaintiff corporation, your label "Alpen Glow"?

A. Yes, sir. In 1933, the month of February, I go to the Bank of America and see the manager of the Sixteenth Street Branch,—Mr. Prenzel. I have Mr. Prenzel to find out if the Bank have any connection with any breweries in our area.

The Bank gave me a letter to introduce me to the manager of the Golden Glow Brewing Company office in Oakland.

The next day, I get the letter, and go to the Golden [103] Glow Brewing Company, with my letter that recommended me to the General Manager of the Golden Glow Brewing Company at Oakland; and I give the letter to Mr. Plaut, General Manager of Golden Glow Brewery.

This was around February, 1933,—the last part of February, 1933. I had a letter in my hand, to go right straight to the Brewery. I haven't got the letter. Mr. Plaut was not at the Brewery. The

(Testimony of John Milonas.)

letter was addressed to Mr. Plaut. I leave it there.

I find another gentleman there. He told me Mr. Plaut is not there; I said, "Where can I find him?" He said, "Mr. Plaut has an office in San Francisco, 11th and Harrison, an ice company". I presume it is the St. Francis Ice Company.

When I come back from Oakland, I go right straight to Mr. Plaut's office, and don't find him there; I don't find him in his office—in his plant; I find another gentleman, who represented Mr. Plaut; and the next day I called.

I telephoned to the Golden West Brewery, Oakland,—which is his office,—to meet Mr. Plaut, or if Mr. Plaut is there. Mr. Plaut,—he answered me on the telephone; and he said, "Don't need to come over, but you can meet me in San Francisco office, 11th and Harrison".

The next day, I go to meet Mr. Plaut. I presume it was the afternoon. When I go to his office, I find, really, a gentleman; and he said the minute I sit down—he said, "I know what you want. Now, in short, what do you want?"

I said, "Mr. Plaut, I want to go to the beer business, and I presume the beer will be back in a month or two and, first of all, I want, if possible, through my accommodations, to know if you can give me the agency for Golden Glow Brewery in San Francisco." [104]

Mr. Plaut said, I am a new General Manager of the brewery, and they have a lot of distributors; but

(Testimony of John Milonas.)

I will try the best I can in the future." I said, "Mr. Plaut, here is my label"—and, as matter of fact, on that day, I presume, the labels—I have my proof of the labels. That is the proof, I mentioned before, from Mr. Roesch.

I said, "Mr. Plaut, I want to put it up if you can bottle me enough beer for this label." Mr. Plaut gets the label and look at it, and he said of it,—gentleman that he was,—"That is a very nice label; a little fancy, but—" he said, "Yes, we are glad to do business with you." He said, "Of course, with 'Alpen Glow' or 'Golden Glow', in San Francisco, and 'Alpen Glow,' we are going to do the business and," he said, "all right."

I said, "I want to tie up with some brewery to order my trucks". He said, "Go ahead, order your trucks, and I promise you I pack all the beer you want for your labels." I said, "Mr. Plaut, a matter of business: I want to know what requirements you have. I am prompt to give you any security for the amount of beer I want, and maybe you want to run ten days or fifteen days or a month or cash." He says: "Well, after we start to do this we sign up the contract when the beer is legal." I said, "All right, Mr. Plaut."

I leave Mr. Plaut and go out to my business; and, a day after or two, I got my trucks; and, some time in March, I was ready to go to Mr. Plaut's office and sign the agreement; and that time, that same

(Testimony of John Milonas.)

day, the banks closed. What day the Banks close, I don't remember.

The minute I go to Mr. Plaut's office, he told me just exactly—he said, "We are up against it, young fellow; [105] the banks closed, and we don't know where we will get that beer." I said, I have a little money, and I put it in trucks; I put in the order"; and we laughed; and Mr. Plaut said to me—he said "Now, go outside, try the best you can, and go right here to the neighborhood, the Golden State Brewery and the Milwaukee Brewery of San Francisco, make arrangements with them to get all the beer you can, because you want your trucks, [106] and you have your labels; try the best you can; don't lay down and cry because you cannot buy beer; a lot of beer is on the market; and," he said, "if, in the future, I will be glad to work with you and I be glad to pack your own beer, and, if possible, I can give you beer with our own label,—'Golden Glow'; but I don't promise you anything".

Mr. Graham: Q. That was his statement? He did not promise you?

Witness: A. He did not promise to give me "Golden Glow". Mr. Plaut was connected with the Golden West Brewing Company. He told me he was General Manager, at the time.

Mr. Graham: Q. Did you rely on the statement of Mr. Plaut in going ahead with the use of the "Alpen Glow" label on beer?

(Testimony of John Milonas.)

A. Yes. The label I showed Mr. Plaut was similar to this label here—Defendant's Exhibit "K". The first conversation I had with Mr. Plaut, I just handed him the proof. The second time, I showed him the label.

Q. What did you do in reliance on the statement of Mr. Plaut?

A. I follow his advice.

Q. What did you do?

A. I go out, looking for beer.

Q. Did you purchase any bottles?

A. I don't purchase no bottles, but I place orders.

Q. You placed an order?

A. Yes.

Q. For beer with what company?

A. Milwaukee Brewery in San Francisco.

Q. You spoke about buying delivery trucks?

A. Yes.

Q. Did you buy some delivery trucks?

A. I have bought the delivery trucks when the time I talk to Mr. Plaut, —the month of February.

Q. Did you buy the delivery trucks before the banks closed? [107]

A. Before the banks closed. I began to sell my Alpen Glow beer the first minute, I presume, the 7th of April, 1933, about 12 o'clock in the evening. I have been in the business continuously since then and sold beer, —"Alpen Glow" beer, continuously since then, in San Francisco. I have enlarged my

(Testimony of John Milonas.)

place of business. This is a photograph of the interior of my place of business.

(It was stipulated that April 7, 1938, was the first day that beer of so-called full alcoholic content could be sold.)

(The photograph was marked "Defendant's Exhibit BB".)

Mr. Graham: You say you have registered your trademark in the United States Patent Office?

A. That is correct.

Q. And furnished there a certificate, which is shown on Exhibit "B" to be May 12, 1933?

A. That is correct.

Q. When you filed your application for registration, did the plaintiff in this case, —Golden West Brewing Company, —file an opposition proceeding to your registration?

A. Yes.

Q. What disposition was made of that opposition; how was it disposed of; how did it end?

Mr. Townsend: We have a record here of the proceedings, and it will show that we dismissed the opposition without prejudice.

The Court: Let the record so show. That is what you wanted to cover?

Mr. Graham: Yes.

Q. When the opposition in the Patent Office was disposed of, what did you do; what was its effect on you and your business?

A. Not at all.

(Testimony of John Milonas.)

Q. Did you take any steps to enlarge your business at that time?

A. Yes. [108]

Q. Did you hear Mr. Larry Lavers testify for the plaintiff, yesterday, about window signs?

A. Yes.

Q. Did you ever furnish any dealers any window signs such as he——

A. Yes.

Q. What type of signs do you furnish? I will hand you some signs.

Mr. Hackley: Will you fix that as to the time, Mr. Graham? That question is unlimited. Mr. Lavers fixed his statement as to time. Is this something you have just got out?

A. He don't testify yesterday. I don't think any merchant except those, —except those paint signs—

Mr. Hackley: What was that?

The Court: That may go out.

Mr. Graham: Q. Did you ever furnish any of those hand-painted signs to any merchants?

A. No.

Q. When did you begin to furnish these to the merchants?

A. I could not say, right now, but I presume about six months or a year. I don't remember.

Q. Six months or a year ago?

A. No, 1934—1933 or 1934. I don't remember—1933.

Q. 1933?

(Testimony of John Milonas.)

A. Yes; the last part of 1933.

Q. Mr. Graham: This window display, I offer in evidence as defendant's exhibit next in order.

(The window display was marked "Defendant's Exhibit CC.")

Cross Examination

Mr. Hackley: Q. Is John K. Milonas your true name?

A. That is right.

Q. Are you a native of this country?

A. No.

Q. Where were you born?

A. Greece.

Q. How long have you been in the beer business?

A. Since 1933. [109]

Q. Did you ever deal in beer at all, before 1933?

A. Well, before prohibition, yes.

Q. What did you do during prohibition.

A. I handled beer.

Q. You have dealt in beer for about 20 years, or 25 years?

A. Well, I am here since 1904 up to the time of prohibition, and I handled beer.

Q. Been handling beer from 1904 up to 1920?

A. Before prohibition. Was that in 1920?

Q. About that.

A. Yes.

Q. What did you do between 1920 and 1933?

A. I was in the grocery business in San Francisco.

(Testimony of John Milonas.)

Q. What beer were you selling in 1918 and 1919 that you talked about?

A. What?

Q. 1917, 1918 and 1919.

A. I had Enterprise.

Q. You handled the Enterprise beer?

A. Yes.

Q. Did you handle any Golden West beer?

A. I don't remember.

Q. You remember Golden West beer?

A. Yes, I do, sir.

Q. How long have you known of Golden West Brewing Company?

A. I could not say.

Q. 20 years?

A. Yes; I remember the Brewery was across the Bay, but I never was interested.

Q. When did you first learn of the "Golden Glow" trademark—the "Glow" trademark of the Golden West Brewing Company?

Mr. Graham: I object to that question, because it is a combined question.

A. Since he showed me, and since he put up the application to the Patent Office; that is the first time.

Q. When was that time? Will you fix that, as to time?

A. I could not say. The record shows that. When you yourselves, sent the opposition to the Patent Office. [110]

(Testimony of John Milonas.)

Q. Was the first time you knew of the trademark of the Golden West Brewing Company that time?

A. Yes.

Q. The first time you had ever heard the trademark "Golden Glow" and "Glow"?

A. Absolutely.

Q. That was about what time? Can you fix it?

A. No.

Mr. Graham: I will object to this line of questions, because counsel says "Golden Glow" and then "Glow", putting them both together. If he wants to ask a question about "Golden Glow", he can ask about "Golden Glow". If he wants to ask about "Glow", he can ask about "Glow".

Mr. Hackley: I asked him a question about "Glow".

Mr. Graham: Then you said "Golden Glow" and "Glow".

The Witness: I never heard about that "Glow".

Mr. Hackley: Q. You knew about "Golden Glow"?

A. "Golden Glow."

Q. When did you first know about "Golden Glow"?

A. To know exactly, since the beer came back.

Q. Yes.

A. Because I looked around to get that "Golden Glow" beer.

Q. You looked for it?

(Testimony of John Milonas.)

A. That is what I said a while ago; I was across the Bay to the brewery.

Q. That was in February, 1933?

A. Last of February, yes.

Q. At that time, you knew of Golden Glow beer?

A. Yes.

Q. How long before that had you ever heard of Golden Glow beer?

A. I presume it was before prohibition, or the time real beer was back.

Q. You knew of Golden Glow beer during the near beer time?

A. Yes.

Q. You know of that; that it was made by the Golden West Brewing Company over in Oakland?

A. Yes. [111]

Q. You have known of it, then, for 15 years, probably?

A. I presume, yes.

Q. You testified that you tried to get an agency for Golden Glow beer in San Francisco?

A. Correct.

Q. And the agency was refused you?

A. Well, not entirely.

Q. You did not get any agency, did you?

A. No.

Q. Nobody said you could have an agency, did they?

A. No.

(Testimony of John Milonas.)

Q. Then, it was refused you?

A. Well it is not refused and not promised me. He said, "I will try the best I can."

Q. You did not get it?

A. No; I did not get it."

Q. The attempt which you made to get an agency for Golden Glow beer was before you adopted your "Alpen Glow" brand, wasn't it?

A. No; I have the "Alpen Glow" adopted already.

Q. What do you mean "adopted"?

A. I select the label.

Q. You mean you went to the printer and talked it over with him?

A. Yes.

Q. And adopted the label?

A. Before I go to the Golden Glow.

Q. But you had not used any labels before that?

A. No.

Q. It was long after that, that you first used your "Alpen Glow" label in the trade of beer; isn't that correct?

A. Not long after; no.

Q. How long?

A. Well, now, I adopted the label in December and I go to the Brewery in February—last part of February. I used my label the first day that beer came back,—April 7, 1933. I saw Golden Glow wooden cases when beer was first legalized. I remember the Golden Glow Company's near beer.

(Testimony of John Milonas.)

Q. You testified to going over to the office of Louis Roesch, the label printer?

A. Yes.

Q. What labels did he show to you there?

A. A lot of labels.

Q. Did he show you the "Golden Glow" label?

A. I don't remember. [112]

Q. Do you know that Louis Roesch manufactured the plaintiff's labels?

A. I know Louis Roesch manufactures all the labels; and, as matter of fact, I live on south of Market, and I know Louis, and I go to him as the professor of labels, and as the man that knows the labels; and he knows the rules and regulations about labels, and if you want to get the labels, Mr. Counsel, you have to go to a label manufacturer, or go to the grocery store to buy tomatoes.

Q. You knew, at that time, that Mr. Roesch made the labels for Golden West Brewing Company?

A. I don't know.

Q. You know it now, don't you?

A. I don't know, either.

Q. As far as you know, he may have shown you that "Golden Glow" label that day?

A. I don't remember.

Q. You don't know, but it might have been; he may have shown you the "Golden Glow" label?

A. Maybe; I don't say "Yes" or "No".

Q. The "Alpenweiss" label was not the only one shown to you that day?

(Testimony of John Milonas.)

A. No. He showed me a lot of labels.

Q. Did you get any permission from the owner of the "Alpenweiss" label to use the word "Alpen"?

A. No.

Q. Why did you adopt the word "Glow" in your labels?

A. As I told you, at first I don't like it; and after I go through my dictionary, I find out what it means: "Alpen",—to glow; "Alps"—it means "Alps"; that is "Alpen"; and glow of the Alps; sunrise and sunset.

Q. What dictionary did you go to?

A. I have my own. [113]

Q. You went to it at that time?

A. Yes—not at that time; the next day.

Q. You cannot remember the name of the dictionary?

A. No; I cannot remember.

The Court: You have a convenient mind, I think.

Mr. Hackley: Q. Did you ever get anything in writing from the Golden West Brewing Company entitling you to use the name "Alpen Glow"?

A. No.

Q. The whole subject, as far as you are concerned, was covered in your conversation with this man Plaut?

A. With Mr. Plaut's consent with the Bank, because I know the Bank are interested, at that time, in the breweries.

Q. When, exactly, did you go and see Mr. Plaut?

A. Last part of February.

(Testimony of John Milonas.)

Q. What do you mean by the "last part"?

A. Well, perhaps it was the 20th or the 28th; I don't remember; or perhaps it was March, but 1933.

Q. Why did you go to the Golden West Brewing Company about your label? What were you concerned about?

A. About my label?

Q. What did you go over there for?

A. The Bank introduced me to the Manager,—the General Manager,—of the Brewery—if I can get the distribution on this side and pack beer under my own brand.

The Court: Q. You went over there to get an exclusive agency for the beer in this district in San Francisco?

A. Yes.

Mr. Hackley: Q. That agency was refused to you?

A. Not exactly.

Q. Well, you did not get it?

A. No; because Mr. Plaut don't remain over there. [114]

Q. The only reason you went to the Golden West Brewery Company, then, was to see about an agency for the sale of their beer?

A. The only reason I go there was to bottle the beer under by own name and my own label, "Alpen Glow".

(Testimony of John Milonas.)

Q. You wanted to get an agency for Golden Glow, also?

A. And also to get an agency for Golden Glow.

Q. When did you first receive any objection, in any shape or form, from the plaintiff, to your use of the word "Glow"?

A. I don't know the time; but you know when you sent that affidavit to Washington, to the Patent Office, and when you sue me two years ago, to appear in the court, for "Golden Glow", not for "Glow"; only time I hear of "Glow" was here the other day.

Q. The affidavit you have been talking about was the basis of the opposition proceeding in the Patent Office at Washington, D. C.; is that correct?

A. Yes.

Q. You say that was the first notice you had?

A. That is right.

Q. Of the objection of the plaintiff?

A. Right; and you drop it, and I never heard any more.

Q. That date, then, would be established by—that is on file in the trademark section in the Patent Office, isn't it?

A. My counsel would know.

Mr. Graham: The date of the filing of the opposition would be the approximate date that he was notified.

A certified copy of the file wrapper and contents of the "Alpen Glow" trademark, No. 325,342, dated

(Testimony of John Milonas.)

June 18, 1935, offered as Plaintiff's Exhibit No. 29, and so marked.

Mr. Hackley: Q. I show you a "Golden Glow" label and ask you when you first saw that label, Mr. Milonas. [115]

A. I see the label, but I don't know.

Q. You recognize that label as the one brought out by the Golden Glow when beer went legal on April 7, 1933, don't you?

A. I could not say, because, if I know, I am in the court to give my word.

Q. You have seen the label, but you can not remember just when?

A. I saw the label; I know "Golden Glow"; but I don't know. Maybe you have the other label.

(The label was marked "Plaintiff's Exhibit No. 30".)

Mr. Hackley: Q. What type of trucks do you have in your plant, Mr. Milonas; how are they constructed? Are they the usual beer truck?

A. You have the picture there.

Q. Well, I will show you a photograph, and ask you if you recognize the truck shown there.

A. Yes; that is my truck; that is my "Alpen" truck.

Q. That is your "Alpen Glow" truck? What color combination do you have on that truck, Mr. Milonas?

A. This is exactly like my label; exactly what my label reads there, and the color and everything.

(Testimony of John Milonas.)

Q. You are referring to this type of truck here. Will you tell me what color the background of the truck, on the sides of the truck, is?

A. Is a dark gold and blue.

Q. What color are these lines indicating the setting sun behind the word "Glow"?

A. I think that is red for that part. I don't remember, but I think red,—exactly what the labels are.

Q. The difficulty there, Mr. Milonas, is that you don't have any rays of sun showing on that red.

A. Well, here it is, here.

Q. I ask this one simple question again——

A. Yes.

Q. ——Will you please tell me what color the rays of the sun [116] are behind the word "Glow" on the side of the truck in the photograph I am showing you?

A. Seems to be red.

(The photograph was marked "Plaintiff's Exhibit No. 31".)

Mr. Hackley: Q. I show you Exhibit 26 of the plaintiff, and ask you if you recognize the handwriting on that tag.

A. The tag is mine, but too many words there.

The Court: Q. Do you know whose handwriting?

A. Yes, I do.

Mr. Hackley: Q. Do you know these initials that appear on there?

A. "D. M."

(Testimony of John Milonas.)

Q. Who would that be? In whose handwriting?

A. Well, I have my own daughter, "D. M."

Q. Is that her initials?

A. I couldn't say.

Q. Does it appear to be?

A. Appears to be?

Q. What is her name?

A. Despina Milonas.

Q. Why do your clerks list your beer as "Glow" on the sales tags, instead of "Alpen Glow"?

A. They don't have no instructions to do that; and that is silly to sell "Glow", because nobody comes to me, since I have been in business, and says, "Give me 'Glow' ". It is "Alpen Glow" or "Glow" or "Golden Glow". They say, "Give me 'Alpen Glow' ". You don't say "Give me 'Glow'," if you go into a store, you say, "Give me 'Golden Glow' or 'Alpen Glow.' "

The Court: If his testimony is correct—maybe I am mistaken about it—Louis Roesch selected the name for him.

Mr. Hackley: Q. What volume of beer have you sold in your "Alpen Glow" brand?

A. I cannot answer, because I don't know. I am not prepared, because I never know you will ask me that.

Q. Can you give it to us, approximately?

A. I have to go [117] through all of it; I don't know.

(Testimony of John Milonas.)

Q. As a matter of fact, on this matter of the adoption of the word "Glow," you were told to get the consent of the Golden West Brewing Company before you used it, weren't you, by Mr. Roesch?

Mr. Graham: I object to that.

The Court: Q. Is it a fact?

A. No.

Mr. Hackley: Q. You just adopted the word "Glow" because Mr. Roesch said it was a good word to use; is that it?

A. Mr. Roesch told me that is a good name because if you know about it—the "Glow"; he said for the "Alpen Glow—to look in your dictionary"; and I explained to you the Alps and the Glow.

Q. Mr. Milonas, I show you Exhibit "I"—which is in the form of a quitclaim from yourself to your company, Milonas & Sons, [118] Inc.,—and on that appears the figure 400 shares of capital stock of Milonas & Sons, Inc., given to you, and, above the 400 shares, the numerals "42" appear. Will you tell me which of those figures is correct?

A. I know Milonas & Son and John K. Milonas, and all those readings here.

The Court: Q. What is the number?

Mr. Hackley: Q. You see on here, in line 3 of Exhibit "I", appears the words "400 shares"; and above that, written in, in pencil, appears "42". Which of those figures is correct, or what is the reason why the "42 shares" is written in there?

(Testimony of John Milonas.)

A. Well, I could not say why "42". May be adding 442.

Q. What do you own in that company,—Milonas & Sons, Inc.? How many shares?

A. I own about over 75 per cent.

Q. Over 75 per cent of the Company?

A. Yes.

Q. Who owns the rest of it?

A. My family.

Q. It is a family corporation?

A. Family affair.

Q. Who are the officers of Milonas & Sons, Inc.?

A. I am the Vice President and General Manager.

Q. Who is President?

A. I am president.

Q. Who is Vice President?

A. My wife.

Q. Who is secretary?

A. My daughter.

Q. Who is treasurer?

A. Another daughter.

Q. Who is the head of the concern? Who runs the business?

A. I.

Q. You are the responsible proprietor for the Company, are you?

A. I am the General Manager, and I presume responsible.

Q. The whole works?

(Testimony of John Milonas.)

A. I make the business go allright. If I don't make it go, it is too bad. [119]

Q. Does "Alpen Glow" compete with "Golden Glow" on the market?

A. I don't know.

Q. Are they purchased by the same stores?

A. Yes.

Q. What territory do you sell Alpen Glow beer in?

A. I got the trucks all over.

Q. Just tell us what you mean by "all over".

A. Well, from here, from the Ferry to San Diego.

Q. You sell beer from San Francisco to San Diego?

A. Yes.

Q. Do you go up in the northern part of the state?

A. Yes; all over the State of California.

Q. Sell from your trucks?

A. Sell from the trucks; sell by railroads; sell by boats; send to Honolulu.

Q. What other states do you sell in?

A. That is all.

Q. Do you sell in Oregon?

A. I don't know.

Q. Or Washington?

A. I don't know, maybe.

Q. Nevada, Reno?

(Testimony of John Milonas.)

A. Well, if they come from Reno, I sell; if they come from New York, we sell to them.

Q. Anybody who wants to buy, you sell?

A. That's right, providing if he has a license.

Q. Do you know any instance in which your beer has replaced Golden West beer,—“Golden Glow,”—by your sales work?

A. Well, you can say 90 per cent; they have Golden Glow; they have Alpen Glow.

Q. I am interested in accounts that have replaced Golden Glow beer by Alpen Glow beer.

A. I don't know.

Q. Do you know of any instance like that?

A. I could not make any customers, because they have new customers, too. [120]

The Court: You might as well ask how many customers the Emporium takes away from the White House.

Mr. Hackley: I think the witness could answer that question if he wanted to.

The Court: The answer is in the record. He says he doesn't know.

[121]

Q. Before the incorporation of your Milonas & Sons, Inc., doing business, as General Enterprise Co., was the Alpen Glow business carried on by you as a partner or in partnership?

A. Correct.

Q. What were the names of your partners?

A. I and my sons.

(Testimony of John Milonas.)

Q. Your sons. The same ones as are interested in the present business?

A. Yes; Milonas & Sons, Incorporated.

Q. You did business in a partnership before you incorporated as General Enterprise Company, didn't you?

A. I do business Milonas & Sons, Company; they do business as General Enterprise Company; before that, there was——

Q. You did it as General Enterprise Company; and now you do it as General Enterprise Company?

A. I do business Milonas & Sons; they do business General Enterprise Company.

Q. I want to get one thing there. You started selling your beer in April, 1933,—April 7th?

A. I started in business, Milonas & Sons, do business General Enterprise Company; and after I incorporated Milonas & Sons, Incorporated, do business as General Enterprise Company.

Q. You talked about enlargement of your plant. I will show you a photograph, and ask you if you can tell me whether this was your original or your enlarged plant. Did you hear the question.

A. What?

Q. Is it your original plant or the enlarged plant that you now have?

A. Yes; I started the first business here where this is, and not fireproof,—nothing but old shack;

(Testimony of John Milonas.)

and the Board of Health won't let me stay there, or the City won't let me stay there.

Q. So, you moved from there? [122]

A. I moved from there, and I go to 1960 Folsom Street, and I put up a building of my own to keep for my old age, and I incorporated my business for my sons.

Q. The original plant was located at 20th and Valencia?

A. Yes.

Q. The new plant was located where?

A. 1960 Folsom Street.

Q. When did you move from 20th and Valencia to the Folsom Street plant?

A. Two years ago.

Q. That would be some time in 1936?

A. I presume, 1935; I don't remember.

Q. About two years ago?

A. Correct; maybe more or less.

(The photograph was marked "Plaintiff's Exhibit No. 32").

Q. In referring to Mr. Roesch, in your testimony, you were referring to Louis Roesch of the Louis Roesch Company, Lithographers, located at 1880 Mission Street, San Francisco, California?

A. Yes; 14th and Mission—15th and Mission, I think.

Q. The Louis Roesch Company is not the only company in San Francisco that makes labels, is it?

A. I don't know.

(Testimony of John Milonas.)

Q. You just went to Louis Roesch's Company?

A. Yes.

Q. You knew them and went right to them?

A. Yes.

Q. Is Mr. Roesch with whom you took up this label matter the same Louis Roesch who is head of that company today?

A. I don't know. I know he is there, but I don't know who is the boss. I presume he is.

Q. He is still there today?

A. Yes; and, just a few minutes ago, I talk to him.

Q. The man you talked to in 1933?

A. Yes; I talk to him a little while ago.

Q. His name is Louis Roesch? [123]

A. His name is Louis Roesch. You have got the bill there.

Q. Isn't it a fact, when you took up this matter for your labels with Mr. Roesch, the question as to the use of the word "Glow" came up, and he told you that he would not print such a label for you unless you had the consent of the Golden West Brewing Company?

A. No.

Q. You stand by that answer?

A. Yes.

Q. As a matter of fact, didn't you go back to Mr. Roesch, after you had talked, as you claim, to Mr. Plaut?

A. Yes.

(Testimony of John Milonas.)

Q. And tell him you had the consent of the Golden West Brewing Company to make the "Alpen Glow" labels?

A. No.

Q. You stand by that answer?

A. No, sir.

Q. Isn't it a fact Mr. Roesch wouldn't print your labels at all until you told him you had the consent of the Golden West Brewing Company?

A. No, sir.

Q. Do you know whether or not Mr. Roesch made any inquiry, himself, as to whether the Golden West Brewing Company had any objection to the use by you of the word "Glow" on your Alpen Glow labels?

A. I don't know. Mr. Roesch sent me to his own man to make it,—the copy; where he sent the copy to Washington, D. C., to the Patent Office, or to make registration for this to Mr. Jack,— The gentleman is right there.

Q. Do you mean Jackson and Webster?

A. Yes, Jackson & Webster. He said, when he sent me to Jackson & Webster, "to give the registration to the name, so you will be entitled to 'Glow' in this label."

Mr. Hackley: May I ask that the statement of the witness go out?

The Court: It may go out. [124]

Q. When were you incorporated?—To save time, do you remember that date, Mr. Graham?

(Testimony of John Milonas.)

Mr. Graham: September, 1934.

Witness: A. Correct.

Mr. Hackley: Q. It is a fact that the firm of Jackson & Webster you referred to are just trademark people; they are not attorneys at law?

A. I don't know.

Mr. Hackley: Do you want to make a statement on that Mr. Graham?

Mr. Graham: Yes. I will say they are not attorneys at law; just render trademark service before the Patent Office.

Mr. Hackley: Q. As I understood your direct examination, you said that you telephoned to Jackson & Webster and asked about using "Alpen Glow" labels?

A. Yes; in my presence, Mr. Roesch telephoned to Jackson & Webster.

Q. In your presence?

A. In my presence.

Q. That was the day before this letter, Exhibit—

A. Correct.

Q. (Continuing)—"V" was sent to you?

A. Correct.

Q. You say the office of Jackson & Webster had made a one-day search to give you an opinion?

A. I don't know how many days.

Q. Do you have any knowledge of the basis that an opinion was made on?

A. I couldn't say.

(Testimony of John Milonas.)

Redirect Examination

Mr. Graham: Q. Is Mr. Plaut, that you referred to in your testimony, present here in the courtroom?

A. Yes.

CARL S. PLAUT

called as a witness on behalf of defendant, and testified as follows: [125]

Direct Examination

Mr. Graham: Q. What is your business, Mr. Plaut?

A. Ice business.

Q. What ice company?

A. St. Francis Ice Company.

Q. Are you an officer in that company?

A. Yes; I am the President of the company.

Q. You have been associated with it for a good many years?

A. Yes.

Q. Were you ever at one time connected with the Golden West Brewing Company, the plaintiff in this case?

A. Yes.

Q. What office did you occupy with them?

A. General Manager.

Q. Were you an officer there or on the board of directors or anything of that kind?

(Testimony of Carl S. Plaut.)

A. I think I was. I am not quite sure. Mr. White or Mr. Goerl could say on that. I don't remember whether I was a director or not.

Q. You were General Manager?

A. Yes.

Q. Were you just General Manager nominally or did you actually attend to the business of running the plant?

A. Yes, I attended to the business.

Q. During what period of time were you General Manager?

A. I think, from February 1st to around July of—the first year when beer was returned; I think it was 1933. Mr. John Milonas called on me while I was General Manager of Golden West Brewing Company. It was immediately after—from February until beer became legalized; I think it was 1933, between February and July. It was after February 1st, 1933. Mr. Milonas called on me. I think he was referred to me by a friend, a Vice President of the Bank, who happened to know me and who knew him, and the Bank recommended Mr. Milonas to me because he tried to purchase beer from the Golden West Brewing Company, [126] and he came at his own request, or his own volition, and asked whether he could purchase beer from the Golden West Brewing Company.

The Court: Q. State, as near as you can, the conversation you had at that time and place.

A. Well, as I recollect, I told Mr. Milonas that

(Testimony of Carl S. Plaut.)

the Golden West Brewing Company had various agents in San Francisco already and I did not know whether it could have any more, whether I could do anything for him, because we had already three or four different distributors. Finally, we found out it was not feasible to have another distributor for the distribution of Golden Glow; and finally told him that we could not sell it to him. Subsequently, he returned with a facsimile of a label,—the same label that is now in question.

Mr. Graham: Q. Did the label have the words “Alpen Glow” on it?

A. To my recollection, that was the label, yes, and he tried to purchase beer under that label from the Golden West Brewing Company. He wanted us to bottle it for him under that label. Due to the shortage by the Golden West Brewing Company, and their inability to give him beer because it had various agents who they had to look out for first, and in so far as he went to other breweries to get the beer put up under that label—

Q. Did you mention anything to him about whether you approved or disapproved of his use of the “Alpen Glow” label?

A. He asked me whether I like the label. The label looked nice. I could not particularly find any reason why the Alps had anything to do with the beer, but he had this label and it looked like an attractive label. I did not approve nor object to it.

(Testimony of Carl S. Plaut.)

Mr. Graham: Q. You made no objection to it at that time?

A. None whatever. He had already gone to another brewery—to various breweries, trying to get beer and put up under his own label; and he tried to purchase Golden Glow.

Q. Did you tell him that you thought that was a good name for Beer?

A. He asked me whether I thought it was,—what I thought about it.

Q. What did you tell him?

A. I told him it was all right.

Q. You never objected to his using it, though?

A. No.

I used to be in the brewing business, myself, in Oakland. I was in business from 1900 until prohibition came; approximately 20 years. Since beer has become legalized, on April 7, 1933, I had a distributing agency for beer. For a great many years I have been connected with the beer business.

Q. In your opinion, as a man who has been in the beer business a great many years, would you say there would be any confusion or conflict between Alpen Glow beer and Golden Glow beer?

Mr. Hackley: If your Honor please, I object to that question. That is a question that has ultimately got to be determined by the Court.

The Court: Well, he has been engaged in that activity, and he might assist the Court. I will allow it.

(Testimony of Carl S. Plaut.)

A. Well, it is a personal opinion.

Q. What is your opinion?

A. I think that the large concern—like the Golden West Brewing Company, that has put a great deal of money—has a [128] great deal of money invested in a plant,—it would naturally try to protect its trade name. However, I do not see where Alpen Glow or Golden Glow have anything to do with one another. That is merely an opinion.

CHARLES W. BENEDICT,

called as a witness on behalf of defendant, and testified as follows:

Witness: I am an official in Wellman Peck Company; General Manager of Neighborhood Stores, Inc. I have sold Alpen Glow beer through our stores for the defendant Milonas & Sons, Inc., since March, 1936. We have sold 61,490 cases of canned "Alpen Glow" beer only, for them. We have 9 plants or distributors out of each plant. Our concern is a wholesale one, and we sell beer only through our Neighborhood Stores,—a voluntary organization. We have over 1100 members. Our stores also sell Golden Glow beer.

Mr. Graham: Q. In your experience as a representative of that concern, have you ever received any complaints of confusion?

A. No.

(Testimony of Charles W. Benedict.)

Q. How does Golden Glow sell?

A. Very, very small. We merely sell the beer we [129] have a demand for; and the demand is very heavy for Alpen Glow. The price for Alpen is a much better price than the price of Golden Glow. We pay \$1.75 for Golden Glow, and \$1.55 for Alpen Glow. We maintain the list price on resale, \$2.10 for Golden Glow, and \$1.90 for Alpen Glow.

Mr. Hackley: Q. You get more profit, then?

A. Well, the patronage decides that matter; it is on the volume.

The Court: They are like all other stores; they are in the business for profit. All the stores are alike in that respect.

The Witness: Or they go out.

Cross Examination

Mr. Hackley: Q. The competition in the class of store in which your Alpen Glow is sold is very keen on the price of beer, isn't it?

A. I would say so, yes.

Q. A few cents' difference in the retail price makes a big difference in the sale?

A. Yes.

Q. Your Alpen Glow sales are very definitely more on account of price, are they not,—a lower price than the Golden Glow?

A. Yes.

HARRY BRARENS,

called as a witness on behalf of defendant, and testified as follows:

I am Bottle House Superintendent, San Francisco Brewery. It has been the San Francisco Brewery for more than three years; and before that, it was the Milwaukee Brewery of San Francisco. We pack beer for Milonas & Sons,[130] under the "Alpen Glow" brand. We started in five years ago next month, that would be in April, 1933. We started to bottle it about two weeks before, with the consent of the Government; and we had about six or seven hundred cases of "Alpen Glow" on hand when beer was legalized, and, on the day beer was legalized, that night about midnight we ran the trucks outside and loaded them onto Milonas's trucks.

Q. Do you sell beer, yourself, for your concern? Does your concern sell beer?

A. Yes; Pilsener, under the label "Pilsener Gold Beer."

Q. The same beer that you call "Pilsener Beer", you put the same kind of beer out, yourself, as beer under the "Pilsener Gold Brand" as you do for Milonas?

A. Yes.

Q. Nobody ever made any complaint, about that being inferior to you?

A. No. I have been selling and bottling for Milonas & Sons this Alpen Glow beer ever since April 7, 1933, and I bottle and sell to him today.

(Testimony of Harry Brarens.)

Q. How about the quality of this beer that you put out for Milonas; is it good quality, medium quality, poor quality?

Mr. Hackley: If your Honor please, this man has not shown himself to be qualified with a knowledge of chemistry of beer yet. I think he should be qualified.

The Court: Q. They are in doubt about your being an expert on this grade of beer. Can you distinguish between beer; and, if so, how?

A. Well, I couldn't do that, because I ain't a chemist.

Mr. Graham: Q. Is your beer generally accepted in the trade?

A. Yes, sir.

Q. A good grade of beer?

A. A good grade of beer. [131]

Cross Examination

Mr. Hackley: Q. Why was the name of the San Francisco Brewery changed from Milwaukee Brewery?

A. The Eastern breweries made them change the name.

Q. They were ordered to change it by Court, you mean?

A. Yes. The San Francisco Brewery puts the "Alpen Glow" labels on the bottles.

Q. Do you know the difference between first and second structure beer?

(Testimony of Harry Brarens.)

A. No; I don't.

Q. Did you ever hear those terms?

A. No; I did not.

Q. What price does the Pilsener Gold Beer sell at?

A. \$1.40.

Q. The same as Golden Glow?

A. Yes.

MARK POMAN,

called as a witness on behalf of defendant, and testified as follows:

I am a grocer located at 6th and Howard, and I have been located there for 22 years. I have sold the brand names here involved,—the Golden Glow beer and the Alpen Glow beer. I have sold them ever since the repeal,—since 1933. I have a pretty good demand for Alpen Glow.

Mr. Graham: Q. Do you ever have any complaints to you personally about any confusion between the Alpen Glow and the Golden Glow?

A. Never had any confusion, because there was——

Q. Have you ever had any customers, in all your time of selling or dealing in beer, that asked for a "Glow" beer?

A. Never. [132]

(Testimony of Mark Poman.)

Cross Examination

Mr. Hackley: Q. What price do you sell Alpen Glow for?

A. Alpen Glow is cheaper than Golden Glow. As a fact, I have handled every brand of beer they ever made.

Q. And you buy the cheaper beer?

A. The cheaper beer.

Q. You make more money on Alpen?

A. Make an equal amount of money on both brands.

Q. But you sell the Alpen Glow for a lower price?

A. Yes, sir.

Q. For that reason, you sell more Alpen Glow?

A. We sell more Alpen Glow than all the rest of the brands put together,—of some ten other brands I carry in my store,—on account of the quality and price.

Q. The price makes a big difference?

A. And the quality, also.

The Court: Q. But the price does make a big difference?

A. Not to me.

Q. Well, you sell one brand or the other; that does not make any difference to you?

A. We always figure to make the same amount of profit.

Q. On all or one?

(Testimony of Mark Poman.)

A. Yes. We make the same profit; some beer we sell two for a quarter; other bottles, three for a quarter; and others, four [133] for a quarter; we make the same amount of money.

Mr. Hackley: Q. About how much Alpen Glow beer do you sell?

A. Alpen Glow, I sold at least a thousand cases a year.

Q. In other words, you have been selling it since when?

A. Since the beer came back.

Q. That was about five years ago. You have sold about five thousand cases?

A. I have sold over one hundred cases a month.

Q. You remember the Golden Glow near beer, don't you?

A. I do remember the Golden Glow, but—yes, I remember the near beer; and I sold it; I was running one or two brands of near beer, but I could not remember what brand.

Q. But you were familiar with Golden Glow?

A. Yes, with all the beer on the market.

Q. Well, you knew Golden Glow before you knew Alpen Glow?

A. I don't remember.

Q. You never heard of Alpen Glow near beer, did you?

A. No.

(Testimony of Mark Poman.)

Q. You did know Golden Glow near beer?

A. I don't remember.

Q. How much of a discount off the list price do you get from Milonas, or rebate?

A. I was paying the list price that was posted in the book.

Q. I mean: What rebate does Milonas give you?

A. Never received any rebate in any beer at all.

Q. You get one from Milonas, don't you?

A. No.

Q. You stand by that answer?

A. Yes.

Q. Where were you born?

A. Greece.

CHARLES L. HUGHES,

called as a witness on behalf of defendant, and testified as follows: [134]

I am testifying here responsive to a subpoena.

I am connected with Schlitz Brewing Company. I am Northern Coast representative of sales. I started selling beer in the near beer business, in 1923. During all of that time, I have been in the beer business. I have used the term "glow" in connection with selling beer to indicate its brilliancy, as drawn from the bottle,—put in the glass from the bottle or from the keg; the clearness, the color of it on the glass,—the glass that will contain the beer. I have sold my product to the merchant, my-

(Testimony of Charles L. Hughes.)

self, having to demonstrate the possibility and quality of the beer by either drawing it from the keg or the glass and holding it up, showing the glow it contained. If you pour it from the bottle into the glass and show the brilliancy of the beer, you can do that.

Mr. Graham: Q. You are familiar with the labels here,—“Golden Glow”?

A. Well, I have seen it out here, yes.

Q. What would that brand mean to you as a beer man; what would that language, “Golden Glow” mean to you as a beer man?

A. The only way I could interpret that would be the name of “Golden”. The name “Glow” wouldn’t mean anything to me. The “Golden” is the name of the beer,—the product. The “Glow”—all beers have glow.

Q. All beers have glow?

A. Yes.

Q. How many advertised brands that you know that are glow beers?

A. I am not sure, but I believe there is one in the East. I believe they call it “Brown Glow”. The Alpen Glow and the Golden Glow—that is the only three that I have ever heard.

Mr. Graham: Defendant rests, your Honor.

Rebuttal

Mr. Townsend: We have here a copy of notice of [135] opposition which we filed in that case on

behalf of Golden West Brewing Company, verified on the 16th day of October, 1934. There was a letter from the Patent Office, advising that an answer was due December 8, 1934. The answer was filed on behalf of Milonas, bearing date of December 3, 1934; and then there was a motion to dismiss dated April 9, 1935, reading:

“Comes now the Opposer, Golden West Brewing Company, and moves that the above identified opposition be dismissed without prejudice.”

Signed: “Townsend and Loftus, attorneys for opposer.” It is endorsed: “No objection is raised to the allowance of the foregoing motion. Jackson & Webster, attorneys for applicant.”

In other words, the dismissal was without prejudice and it was noted by the Examiner of Interferences, dated April 20, 1935:

“The motion to dismiss filed by the Opposer on April 13, 1935, is noted by the Examiner.”

“In view thereof, the notice of opposition is hereby dismissed without prejudice. The proceeding is deemed to be terminated and the files are hereby returned to the Examiner of Trademarks.”

If there is no objection to that copy being introduced, I ask that this be marked exhibit next in order for the plaintiff, subject to correction if error is found.

(The notice of opposition was marked “Plaintiff’s Exhibit 33”).

LOUIS ROESCH,

called as a witness on behalf of [136] plaintiff, in rebuttal, and testified as follows:

That he is appearing here under subpoena issued by the plaintiff. That he lives at 2140 Pacific Avenue, and is a manufacturer of labels, printing and lithographing, Louis Roesch Company. Witness is President of Louis Roesch Company, and has been, ever since the death of his father in 1916. He has made labels for the plaintiff Golden West Brewing Company for their beers.

Witness identifies the Golden Glow labels of plaintiff on Exhibits 11, 8, 20 and 27.

Q. When did you first commence to make labels for the Golden West Brewing Company, approximately?

A. My father made labels for the Golden West Brewing Company; it goes pretty far back.

Q. Approximately when did you print the first label for Golden West Brewing Company under the name "Golden Glow", referring to Plaintiff's Exhibit 8?

A. Yes. I think that was 1925, that that label came out—I believe.

Q. Do you know the circumstances surrounding your first discussion with the defendant for printing the defendant's label that you refer to?

A. Mr. Milonas's label, you mean? Yes, I do.

Q. Will you just relate when you first talked to Mr. Milonas about such a label?

(Testimony of Louis Roesch.)

A. Well, it was when the beer was about to come back,—to be legalized.

Q. That was about April 7, 1933, the date of legalization?

A. Just about that time. Mr. Milonas came out to see me about putting out some beer, and he wanted to know about a [137] branding; so we sat down, and I had some different names that I had gathered. In all label businesses, we have a library of names.

Q. Are they read to the customers when they come in?

A. Yes; and in case they want something, we have it ready. I had several names there such as “Alpenweiss”, “Alpenbrau”, and “Alpen——”.

Q. Such things as that?

A. Such things as that.

Q. How did Mr. Milonas arrive at the name “Alpen Glow”; do you remember?

A. We had, as I say, “Alpenbrau” and “Alpen Gold”; and all of [138] a sudden we said “Alpen Glow”.

Q. Well, which one of you said that?

A. Mr. Milonas and I said that,—“Alpen Glow”; I don’t know—anyway, he said, “That’s the name.”

Q. Did he say he liked that name?

A. Yes.

Q. That he would like to adopt it for his beer?

A. Yes.

(Testimony of Louis Roesch.)

Q. Then what did you say?

A. So then I more or less thought a minute; I said, "Now, just a minute". I said, "'Alpen Glow'. Now, what I want you to do before you adopt that name, to relieve me of the responsibility, I want you to go over to Mr. Plaut—" Mr. Plaut was the manager at that time, appointed Manager of the Golden West Brewing Company.

Q. You say "appointed"?

A. I don't know how long but he was Manager at that time. I said, "You come back with his okeh, and we will proceed to make a sketch." Then at that time, I also told him to go to Jackson & Webster and have a search made of that brand,—a trademark research. I believe Mr. Milonas wanted that.

Q. Do you have any recollection, after that of Milonas telling you he had seen Mr. Plaut?

A. Then he came back and said that it was all right; that Plaut said it was all right; so then we proceeded to make the sketch.

Q. You made your first sketch for him on this alleged permission from Plaut?

A. Yes; I got very busy at the time; it was when beer came back; the salesman,—Mr. Bessatini,—carried on from there, because he called at the Milwaukee Brewery; and that is all I can say about that.

Q. You are referring to the Milwaukee Brewery because Milonas [139] has his beer bottled there?

(Testimony of Louis Roesch.)

A. Yes.

Q. In other words, as I understand it, you told Milonas you would not accept any responsibility for printing a "Glow" label until he got the consent of the Golden West Brewing Company?

A. Yes.

Q. Did Mr. Milonas ever present to you any written consent from Golden West Brewing Company, or anything more than just his own statement that Plaut said he could do it?

A. I did not see any.

Q. It was just his statement that he understood Plaut told him he could use it; was that it?

A. It would be all right.

Q. I notice that, on the bottom of the label on Exhibit 8, appears the inscription "Louis Roesch Company, Lith., San Francisco". Does that indicate to you that you printed that label in 1925, or thereabouts?

A. Well, that is our indication; not the exact date, but I know it was before the repeal.

The Court: Q. That was on near beer?

A. Yes, that was the near beer label. I would say, about 1925 that was, and they came out with a new beer just about that time.

Q. You always put your name on the labels that you print?

A. Yes, unless it is required by the customer to leave that off. That is the Union label and our name. Sometimes the customer will say to just put

(Testimony of Louis Roesch.)

the Union label on and leave the name off.

Q. Did you also put your name on the Golden West labels, so far as you remember?

A. Yes.

Cross Examination.

Mr. Graham: Q. How long have you been making Golden [140] Glow labels, Mr. Roesch?

A. I know, from 1916. My father, as I stated, made Golden Glow labels; they were old customers.

Q. Did they have a Golden Glow label as early as 1916?

A. "Golden West, I think.

Q. You did not make any Golden Glow labels at that time?

A. Just the exact date of the "Golden Glow" labels, I am not familiar with that,—the "Golden Glow" words. It came around, I believe, in 1925, or some time in there,—the "Golden Glow" wording.

Q. About how many labels have you made for the Golden Glow brand?

A. I haven't the record of it here.

Q. Well, it would run into hundreds of thousands or millions?

A. It would run into millions and millions.

Q. Did Mr. Milonas come to see you about his labels before beer was legalized?

A. Yes.

Q. How much before?

(Testimony of Louis Roesch.)

A. Well, when we knew, at least, that beer was coming back; the exact date, I don't remember.

Q. Did you telephone to Jackson & Webster, for Mr. Milonas, in Mr. Milonas's presence, or did you send him over to Jackson & Webster?

A. I made the appointment for him to go down to Jackson & Webster, to take care of looking up the brand.

Q. What other things transpired at the same time,—the same day that he was in to see you about getting the report?

A. Well, at different times, Mr. Milonas was in our place,—in and out several times.

Q. Whom did you send him to first,—Jackson & Webster or Mr. [141] Plaut?

A. That was all at the same time,—Mr. Plaut and Jackson & Webster.

Q. Would this letter,—which has been marked "Defendant's Exhibit "V"—refresh your memory as to when you sent Mr. Milonas over to Jackson & Webster? Would the letter refresh your memory as to when you sent Mr. Milonas over to Jackson & Webster?

A. Yes, it does, but this is confusing to me here. It says "near beer" here.

Q. What is the date of that letter, Defendant's Exhibit "V"?

A. December 12, 1932.

Q. It reads as follows:—on Jackson & Webster's letterhead:

(Testimony of Louis Roesch.)

DEFENDANT'S EXHIBIT V.

“Trademarks—Copyrights.

“Louis Roesch Co., 1886 Mission Street, San Francisco, California. Gentlemen: Confirming our telephonic report, this is to advise that Alpen Glow is available for near beer. Yours very truly,

JACKSON & WEBSTER.”

A. I received such a letter, I guess.

Q. Did Mr. Milonas ever have you make any near beer labels for him?

A. Not that I remember of.

Q. His “Alpen Glow” never referred to near beer?

A. No.

Q. So this referred to “Alpen Glow”—that label that he wanted you to make for beer?

A. The reason why this is near beer there, I can see now, because beer was not legalized yet.

The Court: Q. A couple of weeks or so?

A. 1932.

Q. What month is that written?

A. December 12, 1932.

Q. Do you recall the date of the legalization of beer?

Mr. Graham: April 7, 1933. [142]

Q. You sent him over to Mr. Plaut, you say, at the same time that he came in to see you about this label; and you sent him to Jackson & Webster?

(Testimony of Louis Roesch.)

A. I told him to go to see Mr. Plaut, yes.

Q. At the same time that you sent him over to Jackson & Webster?

A. Yes.

Q. Why did you send him to Mr. Plaut at that time?

A. We hit on "Alpen Glow", and there was probably a similarity and I said, "You better go and see Mr. Plaut".

Q. You knew Mr. Plaut at that time?

A. I knew Mr. Plaut a long, long time, yes.

Q. Where did you send him to see Mr. Plaut?

A. I told him to go to the Golden West Brewing Company.

Q. Would it surprise you if Mr. Plaut never was connected with the Golden West Brewing Company until February 1, 1933?

A. Yes.

Q. Did Mr. Milonas take up with you the matter of acting as a witness in this case?

A. Some time ago—I don't know how long this case has been pending; but, some time ago he was subpoenaed to come here. This case came up; I don't know when it was—long ago; or how long this case has been pending.

Q. Has he mentioned it to you since?

A. No; I have not talked about it for some time. I don't know when this case first came up.

Q. Didn't Mr. Milonas talk to you within the last two days about having you come here as a witness?

(Testimony of Louis Roesch.)

A. Mr. Milonas talked to me on the telephone, to make out some contracts, and probably he mentioned it to the salesman. [143]

Q. He did not talk to you at all——

A. He wanted a certain contract.

Q. —yesterday or today, about appearing here as a witness; didn't he talk to you?

A. No, sir.

Q. Has he talked to you within the last ten days?

A. Well, I was in Portland, here, last week; I only got back [144] on Sunday. He was out at the place; he was talking to somebody else, or to one of the salesmen.

Q. Did he talk to you about coming up here to act as a witness in the last—well, within the last ten days or two weeks?

A. No, sir; not to my knowledge, unless he spoke to someone at the plant.

Q. Did you ask him not to call you as a witness?

A. I don't know when the first time was when this case came up.

Q. I am talking about within the last——

A. He came to me when this case first was brought up. I said, "Mr. Milonas——" He said,—Mr. Milonas said, "I am in trouble with the name." I said, "Goodness me, you can't expect me to go into court and testify to that"; so all of a sudden I am subpoenaed today.

Q. Didn't he talk to you, personally, within the last two weeks and ask you to appear here as a witness for him?

(Testimony of Louis Roesch.)

A. I don't know—not in the last two weeks.

Q. Didn't Mr. Milonas talk to you over the telephone today, and ask you about the same matter?

A. Today?

Q. Today.

A. No; I did not talk to Mr. Milonas today.

Q. Over the telephone?

A. No; unless he spoke to our salesman there,—Mr. Bessatini,—who handles his account.

Q. Within the last two weeks, Mr. Milonas has not talked to you at all about coming here as a witness?

A. His office called up Miss Milligan wanted to get some records. I said, "Yes, I will be glad to get that out for you." We got that out. Then, I believe, the next day, he called up on the telephone and wanted a copy of his contract. I said, "Now, that goes back pretty far. Give me a little time to [145] look it up." So, finally, I said, "Come back in half an hour and probably we will have that contract."

Q. Didn't you ask him not to call you as a witness; that you made most of the labels for the brewers in San Francisco, and it would embarrass you?

A. Yes; that is a request I asked about.

Q. That was within the last two weeks?

A. Within the last two weeks?

Q. Was it today?

A. No; not today.

(Testimony of Louis Roesch.)

Q. Over the telephone? Was it within the last two weeks?

A. When I said that, that was when the case first started.

BENJAMIN GOLDMAN,

called as a witness on behalf of plaintiff, in rebuttal, and testified as follows:

I reside at 2728 Clement Street, San Francisco; and am superintendent of Louis Roesch Company. I am in charge of the production, and I have to refer to the files. I have here a label file corresponding to a label shown on Plaintiff's Exhibit 11. This is a copy sheet; a finished label, in February—February 26, 1934. A copy sheet is what we make the label up from. The salesman brings an order in, and you begin with a copy sheet, and they go through the manufacturing department. This is the original copy sheet on this order, and the finished label. February 22, 1934, is the date the order came in to us from the Golden West Brewing Company. The file shows the date of shipment to the Golden West Brewing Company of the first lot of labels of that design on March 1, 1934.

It was stipulated that these labels were shortly thereafter placed on goods and sold in commerce.

GEORGE F. GOERL,

called as a witness on behalf of plaintiff, in rebuttal, and testified as follows:

I was born on October 5, 1880, and my occupation is master brewer and superintendent and Vice President of Golden West Brewing Company. I have been with the Golden West Brewing Company since its incorporation, May 1910. I am Vice President and Superintendent; and have been Vice President since 1933,—January, 1933.

I was treasurer before that, and I have been a director ever since 1910. I am a director today. I have been General Superintendent either since 1913 or 1915.

I am a master brewer, and I hold that capacity with the Golden West Brewing Company. I have been a master brewer since about 1913 or '15. I have charge of the supervision—I have charge of the bottle house; naturally, we have our [147] foreman in the bottle house, and I do the engineering, and also my dual capacity there,—director and Vice President; and Mr. White and I confer frequently, or daily, as to the conduct of the business. I select and prepare the formula for our products.

I am familiar with the records of the Company, particularly the sales records, customers' sales. I have access to them all the time.

I have here, a future delivery order for crowns, dated March 18, 1933, from Western Stopper Company for Golden West Brewing Company, 7th and Kirkham Streets, Oakland, California, 30,000 gross,

(Testimony of George F. Goerl.)

roughly from four to four and a half million crowns with composition cork eight to the inch and aluminum spotted. Those are the crowns that we—that type of crown is what we introduced here in the West. That is signed for the Western Stopper Company by Claude M. Anderson.

I gave this order to Mr. Anderson, personally. These are the shipping bills from the Western Stopper Company for 30,000 gross two-color composition and aluminum eight-inch cork, regular size, spot, \$6,525. It is dated April 1, 1933. That was the date of that shipment; and those crowns were delivered to our concern, subsequently.

The order was delivered to the plant, and the wording or symbol appearing on the caps in this order was just the word “Glow”. That is the cap on Plaintiff’s Exhibit No. 9. That cap, with the word “Glow” alone, was first used in April 1933, when beer first came back. That was the first time we sold it. We bottled it about two weeks prior thereto, under permission of the Government. Other bottles that show the same cap, are Exhibits 11 and 14. [148]

The document identified by the witness including the order of March 18, 1933, for the “Glow” label caps used by Golden West [149] Brewing Company on their beer.

Offered as Exhibit 35.

Mr. Hackley: Mr. Graham, does that satisfy your request for production of documents?

(Testimony of George F. Goerl.)

Mr. Graham: Yes.

Mr. Hackley: Q. Is there anything about Exhibit No. 9 that makes it possible for you to identify when it was bottled and kept at your Oakland plant?

Witness: A. Exhibit No. 9 is a bottle of beer that was marked by my son, who was doing the chemistry work there; he is a graduate of the University of California, and this is marked "December 18, 1934"; and I know that it was put up at that time, just as a sample. The laboratory is under my supervision.

Exhibit No. 9 was standing exactly as packed on the date indicated on that particular label. It is exactly the same as the bottles packed on April 7, 1933. While I was gathering these records in regard to the "Glow" caps, I ran across many invoices with regard to "Glow",—thousands and thousands of them.

We have orders that I went over; I went over these, last night at your request, and they are orders from Hanford, Antioch, Los Angeles, Auburn, Portland, Oregon, Redding, Martinez, Eureka, Susanville, Turlock, Chico. They are for beer, and the beer is referred to as "Glow" consistently throughout all these orders. These orders were directed to the Golden West Brewing Company of Oakland, California. These are the original records received directly from our customers.

(Testimony of George F. Goerl.)

The group of records identified by the witness, comprising sales records from early 1932 into 1933, was received in evidence as Plaintiff's Exhibit [150] 36, in a group.

Witness: These are merely a few of the many similar documents that we have over there. I could produce thousands. I located other records in which the word "Glow" was predominantly used by my Company in dealing with our customers. These records are right here. These are carbon copies of invoices that were sent to the customers. This volume of records 16 inches high covers possibly from three to four months,—from April 6, 1933 to July 31, 1933. They refer to our product both as to the product "Glow" and in other ways. In every instance our beer is referred to as "Glow" beer, just in that way. I find that consistently. I should judge, roughly that there are around 4500 to 5000 invoices here.

Mr. Hackley: Rather than burden the record with the entire document, unless demand is made by Mr. Graham, we will ask leave to place in evidence one of these invoices and ask it be marked Plaintiff's 37.

(The document was marked "Plaintiff's Exhibit 37").

Witness: These documents marked Plaintiff's Exhibit 33 represent only some of the documents of that character that we can produce here.

(Testimony of George F. Goerl.)

Mr. Hackley: Q. You heard Mr. Milonas testify here to some consent that was said to have been given by Mr. Plaut on behalf of the plaintiff for the use by the defendant of the word "Glow" in connection with the trademark; assuming it took place in the fall of 1932, and spring of 1933, what, if any, position did Mr. Plaut hold with your company at that time? [151]

A. Mr. Plaut was never a stockholder of record; therefore, he was never a director, and he just held—He had no interest in the company, but he was there from time to time to supervise the interest of the bank.

Q. Did he have anything to do with the operation of the company,—its sales policy, sales work?

A. If he did, I never heard of it.

Q. Would you have heard of it?

A. I certainly would.

Q. Were you on the job when Mr. Plaut was there?

A. Every day.

Q. How often would Mr. Plaut come to the plant?

A. Not every day; then he would come down maybe at eleven o'clock and leave at twelve.

Q. Who had charge of the actual operation of the business all during the time Mr. Plaut was connected with the firm?

A. Well, Mr. White and I did most of the work.

(Testimony of George F. Goerl.)

Q. Did Mr. Plaut have any part in it, or do any part of it?

A. No; he always said, "Whatever you boys do is perfectly all right with the bank."

Q. He was just there as an overseer of the bank?

A. That is the way it came about, yes.

Q. To watch its interests. Did Mr. Plaut ever call your attention to any consent that he or anybody else had given to Milonas & Sons regarding the use of the word "Glow"?

A. None whatever.

Q. Did the board of directors ever have any such matter before them?

A. No.

Q. Did Mr. Plaut have any authority from the board of directors to give such consent?

A. The board of directors never gave any such consent. [152]

Q. You were a member of the board at that time.

A. I was.

Q. You would have known it, if any such consent had been given?

A. I would have.

Q. When was the first time you ever heard of this alleged consent Mr. Milonas claims Mr. Plaut gave to him?

A. In court, this morning.

(Testimony of George F. Goerl.)

Q. Approximately when did Mr. Plaut start his work at the plant of the Golden West Brewing Company?

A. The latter part of 1932.

Q. For how long?

A. Up until the first meeting after April 7, 1933; and after the first meeting, we arranged our affairs and we bought out the other stockholders and we paid off the bank and we severed our connection with Mr. Plaut.

Q. What was the approximate date of that meeting you refer to—what month did it occur in?

A. In April 1933.

Q. You have heard reference, during the last couple of days, to an opposition proceeding between plaintiff and the defendant, relating to the registration of the defendant's trademark in the United States Patent Office?

A. I have.

Q. Were you acquainted with that problem at the time it occurred?

A. I was.

Q. Do you know why that opposition was dismissed?

A. Upon the advice of counsel; that he could stop the registration, but that probably it would be better if this suit was brought, and he thought it would be better to bring it in one action.

(Testimony of George F. Goerl.)

Q. Well, due to the double expense that would be incurred and it all could be accomplished in this case?

A. Yes.

Plaintiff rests. [153]

Surrebuttal.

JOHN K. MILONAS,

recalled in surrebuttal by the defendant and testified as follows:

Mr. Graham: Q. Mr. Milonas, have you talked to Mr. Louis Roesch in the last two weeks?

A. Yes, more than that; and I talk to him every week.

Q. Two or three weeks ago, you talked to him, personally?

A. Yes.

Q. Have you talked to him today?

A. I phoned to him today, but I talk to his secretary.

Q. When you last talked to him, did you ask him to come here and appear as a witness?

A. Yes.

Q. What did he tell you?

A. I told him to come as a witness because he prepared one of the labels, and I want him to tell to the Court about his sending me—I never know anything about that; he sent me to—They sent me

(Testimony of John K. Milonas.)

to Mr. Webster,—that is, Mr. Louis Roesch; and Mr. Louis Roesch, every week I met him, and he state me not to bring him into court because he do business with all the breweries in San Francisco and across the Bay, and he said “Please respect my position.” I was gentleman enough not to bring him here.

Cause submitted on briefs.

TOWNSEND & HACKLEY,
CHAS. E. TOWNSEND,
ROY C. HACKLEY, JR.,
Attorneys for Plaintiff-Appellant.

Dated: December 23, 1938.

[Endorsed]: Filed Dec. 23, 1938. [154]

[Title of District Court and Cause.]

PETITION OF PLAINTIFF FOR ORDER ALLOWING APPEAL AND FIXING BOND ON APPEAL.

The plaintiff herein, Golden West Brewing Company, a corporation, feeling itself aggrieved by portions of the Decree of this court entered in this cause on June 15, 1938, denying plaintiff an accounting for infringement of the several registrations of United States Trademarks herein sued upon and otherwise finding adverse to plaintiff, comes now, by its solicitors and [155] counsel, and prays this

Honorable Court for an order allowing plaintiff to prosecute an appeal as aforesaid from said Decree and certain of the findings therein contained to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, plaintiff further praying that an order be made by this court fixing the amount of security which plaintiff shall give and furnish upon such appeal.

TOWNSEND & HACKLEY,
CHAS. E. TOWNSEND,
ROY C. HACKLEY, JR.,
Solicitors and Counsel for
Plaintiff.

Dated: September 14th, 1938.

[Endorsed]: Filed Sept. 15, 1938. [156]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes plaintiff herein, Golden West Brewing Company, a corporation, and makes the following assignment of errors upon which it will rely upon its prosecution in the above- [157] entitled cause of an appeal from portions of the Final Decree made by this Honorable Court and entered herein on or about June 15, 1938:

(1) That the Court erred in staying the issuance of the injunction directed to defendant, its officers,

directors, associates, attorneys, clerks, servants, agents, workmen, employees, confederates and those in privity with each of the same, from directly or indirectly employing the word "Glow" or any colorable imitation thereof as a trademark or trade name in the advertising or sale of its malted beverages to a date not later than September 30, 1938.

(2) That the Court erred in denying an accounting to plaintiff for profits lost by plaintiff and/or for damages suffered by plaintiff, in consequence of the infringement by defendant of plaintiff's United States Registrations No. 232,983, dated September 20, 1927, for the trademark "Golden Glow"; No. 322,361, dated March 5, 1935, for the trademark "Golden Glow"; and No. 307,486, dated October 24, 1933, for the trademark "Glow".

(3) That the Court erred in effectively permitting defendant, by the staying of the injunction in this proceeding as aforesaid, to continue, under protection of the court, to practice the infringements found by the Court to have existed at all times from April 7, 1933, to the date of the entry of the Decree in this proceeding on June 15, 1938.

(4) That the Court erred in finding that defendant [158] adopted and used the mark "Alpen Glow" in good faith and without wrongful and fraudulent intent, despite the fact that the Court found said mark to infringe plaintiff's registered trademarks "Glow" and "Golden Glow".

(5) That the Court erred in concluding as a matter of law that it would be inequitable to enjoin

defendant from using up and disposing of the inventory of goods, containers, labels, and bottle caps bearing the mark "Alpen Glow" possessed by defendant on May 31, 1938, and by the court found to comprise at least the following:

Filled cans of Beer in lithographed cans (24 to the case).....	500 cases
Filled bottles of Beer (24 to the case)	1,675 cases
Lithographed empty cans for Beer (24 to the case).....	10,783 cases
Paper labels on hand for Beer bottles sufficient for 22,957 cases of 24 bottles each,	

except within a reasonable time; and in that connection the Court further erred in concluding and fixing such reasonable time as not later than September 30, 1938.

(6) That the Court erred in concluding that it would be inequitable in law to award an accounting to plaintiff for profits or damages; and the Court further erred in that connection in denying such an accounting.

(7) That the Court erred in failing to find that the marketing and sale of beverages by defendant under the mark "Alpen Glow" in competition with plaintiff constituted unfair [159] competition.

(8) That the Court erred in failing to decree and order that defendant deliver up to the court for destruction all labels, signs, prints, packages,

wrappers and receptacles of defendant, bearing the mark "Alpen Glow", and any reproduction, counterfeit, copy, or colorable imitation of the word "Glow".

(9) That the Court erred in failing to find that defendant infringed the several trademark registrations in suit by the use of the mark "Alpen Glow" in the sale of beverages.

(10) That the Court erred in failing to enjoin the sale of beverages by defendant bearing the mark "Alpen Glow".

TOWNSEND & HACKLEY,
CHAS. E. TOWNSEND,
ROY C. HACKLEY, JR.,

Solicitors and Counsel for
Plaintiff.

Dated: September 14th, 1938.

[Endorsed]: Filed Sept. 15, 1938. [160]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING
APPEAL BOND.

Petition for Appeal to the United States Circuit Court of Appeals for the Ninth Circuit and Assignment of Errors having been filed in this court by Golden West Brewing Company, a [161] corporation, plaintiff in said cause,

Now, therefore, it is Ordered, that said appeal be and the same is hereby allowed; and that the amount

of bond on said appeal of Golden West Brewing Company be and the same is hereby fixed in the sum of One Thousand Dollars (\$1000.00), the same to act as security for any costs that may be taxed against said plaintiff should plaintiff fail to sustain its appeal.

It is further ordered that upon the filing of such security a certified transcript of the record and proceedings, papers, documents and exhibits herein, in accordance with the Statutes and Equity Rules, be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

MICHAEL J. ROCHE,

United States District Judge.

Dated: September 14, 1938.

[Endorsed]: Filed Sept. 15, 1938. [162]

Fidelity and Deposit Company of Maryland
Baltimore

The premium charged for this bond is \$10.00 for the term thereof.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, the Plaintiff in the above entitled action is about to appeal to the United States Circuit Court of Appeals for the ninth Circuit from portions of a decree entered against it in said action

in said Southern Division of the United States District Court in and for the Northern District of California which said decree was entered in said Court on the 15th day of June, 1938.

Now Therefore, in consideration of the premises, and of such appeal, the undersigned Fidelity and Deposit Company of Maryland, a corporation duly organized and existing under the laws of the State of Maryland and duly authorized and licensed by the laws of the State of California, does hereby undertake and promise, on the part of the Appellant, that the said Appellant will pay all damages and costs which may be awarded against it, the said Appellant, on the appeal or on a dismissal thereof, not exceeding One Thousand and no/100 (\$1,000.00) Dollars, to which amount it acknowledges itself justly bound.

In Witness Whereof, the Corporate Seal and Name of [163] said Surety Company is hereto affixed and attested at San Francisco, California by its duly authorized officers this thirteenth day of September, 1938.

In case of a breach of any condition hereof the above entitled Court may, upon notice to said Fidelity and Deposit Company of Maryland, Surety hereunder, of not less than ten days, proceed summarily in the above entitled action or procedure to ascertain the amount which said Surety is bound to pay on account of such breach and render judg-

ment against said Surety and award execution therefor.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
By JOHN W. LATHAM,
Attorney-in-fact.

Attest: E. CASLER,
Attesting Agent.

State of California
City and County of San Francisco—ss.

On this 13th day of September, 1938, before me, Emily K. McCorry, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared, John W. Latham, attorney-in-fact, and E. Casler, Agent of the Fidelity and Deposit Company of Maryland, a corporation, known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the Attorney-in-Fact and Agent respectively of said corporation, and they, and each of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney-in-Fact and Agent respectively.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the

City and County of San Francisco the day and year first above written.

EMILY K. McCORRY,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires January 16, 1939.

I hereby approve the foregoing bond dated September 14, 1938.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Sept. 15, 1938. [164]

[Title of District Court and Cause.]

ORDER RE TRANSMITTAL OF EXHIBITS
TO CIRCUIT COURT OF APPEALS.

It is hereby ordered that all of the original exhibits in this cause may be withdrawn from the files of the above entitled Court and of the Clerk hereof, and by said Clerk transmitted to [165] the United States Circuit Court of Appeals for the Ninth Circuit, as a part of said record on appeal; said original exhibits to be returned to the files of the above entitled court upon the final determination of said appeal by said United States Circuit Court of Appeals for the Ninth Circuit.

MICHAEL J. ROCHE,

United States District Judge.

Dated: September 14th, 1938.

[Endorsed]: Filed Sept. 15, 1938. [166]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL.

To the Clerk of the United States District Court
for the Northern District of California, South-
ern Division:

Sir: Please prepare a transcript of record for
the Circuit Court of Appeals for the Ninth Circuit
for the above entitled cause, including the following
papers and orders, namely:

- (1) Bill of Complaint with annexd exhibits.
- (2) Order of Court Denying Defendants'
Motion to Dismiss, May 19, 1936.
- (3) Answer to Bill of Complaint.
- (4) Amendment to Answer of Defendant.
- (5) Findings of Fact and Conclusions of
Law.
- (6) Final Decree.
- (7) Plaintiff's demand for Payment of
Costs.
- (8) Satisfaction of Judgment for Costs.
- (9) Writ of Injunction including return of
service thereof.
- (10) Petition of Plaintiff for Order Allow-
ing Appeal.
- (11) Assignment of Errors.
- (12) Order Allowing Appeal.
- (13) Order Transmitting Exhibits to
United States Circuit Court of Appeals.
- (14) Citation on Appeal.
- (15) Receipt of Copy of Citation.

(16) Statement of Evidence.

(17) All exhibits, documentary or otherwise, offered or received in evidence at and during the trial and final hearing in said cause.

(18) This Designation of Contents of Record. [167]

TOWNSEND & HACKLEY,
CHAS. E. TOWNSEND,
ROY C. HACKLEY, JR.,

Attorneys for Plaintiff.

Receipt of a copy of the within Designation of contents of Record on Appeal is hereby acknowledged, this 23rd day of December, 1938.

WM. S. GRAHAM,
Attorney for Defendant.

[Endorsed]: Filed Dec. 23, 1938. [168]

[Title of District Court and Cause.]

ORDER.

It Appearing that the condensed statement of evidence having been lodged with the Clerk of the United States District Court, and it being necessary to give said Clerk additional time within which to certify the condensed statement of evidence it is hereby ordered that the time for docketing the above-entitled cause on appeal may be and is hereby extended to the 14th day of January, 1939.

Dated: December 27, 1938.

MICHAEL J. ROCHE,
United States District Judge. [169]

It is hereby stipulated by and between the parties hereto through their respective counsel, that appellant may have to and including the 14th day of January, 1939, within which to docket the above-entitled cause on appeal.

Dated: December 27, 1938.

TOWNSEND & HACKLEY,
CHAS. E. TOWNSEND,

Attorneys for Plaintiff.

WM. S. GRAHAM,

Attorney for Defendant. [170]

[Title of District Court and Cause.]

CITATION

The President of the United States of America to
Milonas & Sons, Inc., a corporation, defendant,
Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City and County of San Francisco, State of California, within thirty (30) days from the date hereof [171] pursuant to an order allowing an appeal of record in the Clerk's office in the United States District Court for the Northern District of California, Southern Division, wherein Golden West Brewing Company, a corporation, is appellant and you are appellee, to show cause, if any there be, why the appealed portions of the decree rendered against the

said appellant, Golden West Brewing Company, as in said order allowing said appeal mentioned, should not be corrected, and why speedy justice should not be done to the plaintiff-appellant in that behalf.

Witness the Honorable Michael J. Roche, United States District Judge for the Northern District of California, Southern Division, this 14th day of September, A. D. 1938.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Sept. 15, 1938. [172]

[Title of District Court.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 172 pages, numbered from 1 to 172, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Golden West Brewing Company, etc., vs. Milonas & Sons, Inc., etc., No. 3969-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$21.55 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of January A. D. 1939.

[Seal]

WALTER B. MALING,

Clerk.

B. E. O'HARA,

Deputy Clerk. [173]

[Endorsed]: No. 9070. United States Circuit Court of Appeals for the Ninth Circuit. Golden West Brewing Company, a corporation, Appellant, vs. Milonas & Sons, Inc., a corporation, operating under the fictitious styles of "Willows Brewing Co." and "General Enterprise Co.", Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed, January 14, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.